IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appeal No. (not yet assigned)	:
In re Application of	:
NEREIDA MARIA MENENDEZ et al.	: Group Art Unit: 3629
Serial No. 09/698,502	: Examiner: Naresh Vig
Filed: October 27, 2000	: Attorney Docket No. 285277-00018
METHOD FOR COMPLETING AND STORING AN ELECTRONIC RENTAL AGREEMENT	: Confirmation No. 6442

APPELLANT'S BRIEF ON APPEAL

February 4, 2005

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is an Appeal from the decision of the Examiner, dated May 11, 2004, rejecting Claims 1-18 of the above-captioned application. The claims are set forth in Appendix 1, which is attached hereto.

The Appellant's Brief On Appeal (Appeal Brief) is accompanied by a Petition for a one-month extension of time pursuant to 37 CFR §§ 1.136(a) and 41.37(e).

An Oral Hearing is not deemed necessary or desirable and is not requested.

Real Party In Interest

The real party in interest is Vanguard Trademark Holdings S.à.r.l., a private limited company organized and existing under the laws of Luxembourg, with its registered office at 46/A Avenue J. F. Kennedy, L-1855 Luxembourg.

Related Appeals and Interferences

There are no prior and pending appeals, interferences or judicial proceedings known to Appellant, the Appellant's legal representative, or assignee which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Status of Claims

Claims 1-18 stand rejected.

Claims 1-18 are being appealed.

Status of Amendments

There are currently no amendments to pending Claims 1-18. The claims as they stand on appeal are contained in the Appendix 1 to this Appeal Brief.

Summary of Claimed Subject Matter

The present invention provides a method for completing and storing an electronic rental agreement 4, comprising entering reservation-related information 8 and rental-related information 10 for an item 11 or service 168, the entering step entering: (a) the rental-related information 10a without employing a master rental agreement 12, or (b) at least some of the rental-related information 10b from a master rental agreement 12 and allowing modification 13 of the information 10b from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12; providing a reservation 16 for the item 11 or service 168 based at least in part upon the reservation-related information 8; creating and displaying 14;28;124;142 a rental proposal 18;268 based upon the reservation 16 and the rental-related information 10; electronically accepting 20 the rental proposal 18; and storing 646 the electronic rental agreement 4 based upon the accepted rental proposal 18. *See* Figure 1, page 5, line 26 through page 6, line 26, and page 6, line 30 through page 7, line 14 of the specification. *See also* Figure 3, page 10, line 20 through page 12, line 17; Figure 4, page 12, line 18 through page 14, line 3; Figure 5, page 14, line 4 through page 14, line 21; Figure 6D; Figure 6K, page 22, line 32 through page 23, line 10; and Figure 8, page 29, line 12 through page 30, line 25.

The method further comprises entering at least some of the rental-related information 10b from a master rental agreement 12, and allowing modification 13 of the information 10b from the master rental agreement 12 for rental of the item 11 or service 168 without modifying the master rental agreement 12. *See* Figure 1, and page 7, lines 3-6 of the specification. *See also* Figure 6B, page 17, line 24 through page 18, line 7, and page 31, line 27 through page 32, line 2 of the specification.

The method also comprises maintaining 560 a history of rental information for prior rentals by a user, entering information 338 from an identification of a user, and entering 562 at least some of the rental-related information 320,334 from the history based upon the information from an identification of a user without employing a master rental agreement. *See* Figures 6F and 7B, and page 25, lines 13-22 of the specification.

The method further comprises storing a flag 654;656,658,660 along with the unique transaction 640 in the database system 646 to indicate that the accepted rental proposal 18,20 is electronically signed. *See* Figure 8, and page 29, line 24 through page 30, line 25 of the specification.

The method also comprises employing 176 the stored flag 654 to enable allocation of the item or service at a kiosk. *See* Figures 5 and 8, and page 29, line 24 through page 30, line 11 of the specification.

The method further comprises completing and storing the electronic rental agreement 4 based upon the accepted rental proposal 18,20 without completing a handwritten rental agreement. *See* Figure 1, and page 32, lines 3-10 of the specification.

Grounds of Rejection to be Reviewed on Appeal

Claims 1-5, 10-12, 14-16 and 18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over "Information on Hertz Corporation, 1997 - 2000" (Hertz) in view of "Information on Avis Rent A Car, Inc., 03 March 2000" (Avis).

Claims 6-9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of U.S. Patent No. 5,389,773 (Coutts et al.).

Claims 13 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hertz in view of Avis and further in view of "Dollar Rent A Car Introduces DOLLAR® TRAVEL CENTER At Key Airport Locations, Customers Obtain Free Travel Information at Interactive Kiosks, 14 May 2000, www.kioskcom.com" (kioskcom.com).

Argument

The Examiner has incorrectly deduced obviousness from the cited references, Hertz[1] and Avis, since a combination of the teachings of those references does not suggest (expressly or by implication) the possibility of achieving further improvement by combining such teachings along the line of the invention, as claimed, and/or the invention, as claimed, has achieved more than a combination which those references suggested, expressly or by reasonable implication.

In considering whether obviousness has been correctly deduced from the prior art, relevant questions include:

> (a) whether a combination of the teachings of all or any of the references would have suggested (expressly or by implication) the possibility of achieving further improvement by combining such teachings along the line of the invention in suit, and (b) whether the claimed invention achieved more than a combination which any or all of the prior art references suggested, expressly or by reasonable implication.

In re Sernaker, 702 F.2d 989, 994, 217 U.S.P.Q. 1, 5 (Fed. Cir. 1983). A rejection must pass both of these tests to be proper. *Id.*

In interpreting the meaning of patent claims, "[w]ords in a claim 'will be given their ordinary and accustomed meaning unless it appears that the inventor[s] used them differently.'" *Jonsson v. Stanley Works*, 903 F.2d 812, 820, 14 U.S.P.Q.2d 1863, 1870 (Fed. Cir. 1990) (quoting *Envirotech Corp. v. Al George, Inc.*, 730 F.2d 753, 759, 221 USPQ 473, 477 (Fed. Cir. 1984)).

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[1] During prosecution, Applicants traversed and Appellant continues to traverse the incorporation of any portion of Hertz which clearly does not contain a date of public posting (or which was not archived) prior to Applicants' filing date. Those portions of Hertz include pages 37-52 and 54-61, which show a date of 2002, which date is clearly after Applicants' filing date. Pages 37-52 and 54-61 of Hertz were clearly not archived by www.archive.org prior to the filing date of October 27, 2000.

Claims 1-5, 10-12, 14-16 and 18, rejected under 35 U.S.C. § 103(a)

Claim 1

The ordinary and accustomed meaning of the term "rental agreement" means the same as "rental contract," which is legally binding on the parties entering into it. *See* Webster's Third New International Dictionary, p. 43 (1993) (Appendix 2 – Evidence Appendix) (entered in the record by the Examiner with the Response filed on September 13, 2004; *see* Advisory Action mailed on November 3, 2004 (box 7.b)). *See, also*, the present specification at page 12, line 6 ("accepted rental contract").

With regard to the first test of *In re Sernaker*, the cited references do not teach or suggest, either expressly or by implication, the possibility of achieving further improvement by combining their teachings along the line of Appellant's invention which electronically accepts a ***rental*** proposal, and stores an electronic ***rental*** agreement (*i.e.*, an electronic rental contract, which is legally binding on the parties entering into it) based upon an accepted rental proposal. Although both references teach or suggest electronically accepting a reservation proposal, and storing an electronic reservation agreement based upon an accepted reservation proposal, the references, whether taken alone or in combination, do not teach or suggest the refined recital of Claim 1. Accordingly, the Examiner errs under the first question of *In re Sernaker*.

Furthermore, as to the second test of *In re Sernaker*, the subject invention achieves more than a combination suggested, either expressly or by reasonable implication, by the cited references. The references, taken as a whole, do not teach or suggest storing an electronic ***rental*** agreement (*i.e.*, an electronic rental contract, which is legally binding on the parties entering into it) based upon an accepted rental proposal, which is part of Appellant's invention.

Clearly, there is no meeting of the minds between Hertz and the user as to exact price and to exact optional items associated with the reservation. See, for example, page 67 of Hertz, which shows that the user and Hertz have not agreed upon liability insurance, loss damage waiver, and personal property insurance and, thus, have not agreed upon a rental price. The exact price and the exact optional items are

clearly essential, material terms[2] to a rental agreement (*i.e.*, rental contract, which is legally binding on the parties entering into it).

Hertz teaches away from an electronic rental agreement (*i.e.*, an electronic rental contract, which is legally binding on the parties entering into it) because the rental price and other material terms in Hertz are not yet determined. Avis adds nothing to Hertz in this regard. For example, Avis (page 10) clearly states that the rate is an "Approximate Total". Also, Avis (page 6) clearly states that "Optional Coverages" can only be purchased at the rental counter at the time of rental. Therefore, there can be no rental agreement (*i.e.*, rental contract which is legally binding on the parties entering into it) in Avis. At best, Hertz and Avis teach or suggest an electronic reservation, which subsequently requires a printed and hand-signed physical rental agreement at the time of rental. As set forth in the present specification at page 3, lines 10-13, in such circumstances, the user, such as a business traveler or a person on vacation, must complete a handwritten rental agreement at a rental counter, thereby wasting business or vacation time at the counter. Therefore, the references do not teach or suggest creating and displaying a rental proposal based upon reservation and rental-related information; electronically accepting such ***rental*** proposal; and ***storing*** an ***electronic rental*** agreement (*i.e.*, electronic rental contract, which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal.

At best, Hertz and Avis teach or suggest an electronic reservation, which subsequently requires a future printed and hand-signed physical rental agreement. Therefore, the Examiner errs under the second question of *In re Sernaker*.

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[2] The cases are legion in which courts have held that an "agreement to agree" upon a material term is not a contract. *See, e.g., Belitz v. Riebe*, 495 So. 2d 775, 776 (Fla. Dist. Ct. App. 5th Dist. 1986) (lack of deed restrictions as essential terms renders the contract indefinite, uncertain and incapable of specific performance); *Gregory v. Perdue, Inc.*, 267 S.E.2d 584, 586 (N.C. App. 1980) (essential and material terms, such as quantity, are required to constitute a valid contract); *Burgess v. Rodom*, 262 P.2d 335, 336 (Cal. App. 1953) (an "agreement to agree" lacking essential and material terms means there was never an agreement or purchase and sale); *Machesky v. Milwaukee*, 253 N.W. 169, 170 (Wis. 1934) (price is an essential term); *Sun Printing & Pub. Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470, 471-72 (N.Y. App. 1923) (failure to agree on term as an essential element results, *prima facie*, in the failure of the contract; hence, the defendant is not bound). For convenience of reference by the Board, copies of these authorities are reproduced in Appendix 3 - Other Authorities, as suggested by 37 CFR § 41.12(b).

Accordingly, under either or both of the two tests, the claimed invention is not obvious in light of the references.

It is not disputed by the Examiner that Hertz does not disclose storing an electronic rental agreement based upon an accepted rental proposal.

Furthermore, Hertz does not teach or suggest permitting a user to complete and store an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) for a vehicle without employing a master rental agreement. In the final Office Action (mailed May 11, 2004) (page 5, ¶1), the Examiner merely points out that Hertz (pages 62 and 66) can enter reservation-related information and rental-related information without employing a master rental agreement. There is no teaching or suggestion in Hertz of completing and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) for a vehicle without employing a master rental agreement. It is not disputed by the Examiner that Avis adds nothing to Hertz in this regard.

Hertz also does not teach or suggest entering some rental-related information from a master rental agreement and allowing modification of information from such master rental agreement without modifying such master rental agreement.[3] The references do not teach or suggest the recited entering step in combination with storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal. It is not disputed by the Examiner that Avis adds nothing to Hertz in this regard.

Furthermore, Avis, which discloses (page 10) a reservation confirmation, adds nothing to Hertz regarding the refined recital of Claim 1. Avis discloses a reservation confirmation and a reservation cancellation (page 13) rather than electronically accepting a ***rental*** proposal, and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal. Avis (page 10) expressly teaches an "Approximate Total" as part of a reservation confirmation. Since the exact price is clearly an essential, material term to a rental agreement, Avis does not teach or suggest and, in fact, teaches away from electronically accepting a rental proposal,

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[3] This point is discussed below in connection with Claim 4. Those arguments are expressly incorporated by reference with the arguments in connection with Claim 1.

and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal.

Accordingly, for the above reasons, Claim 1 patentably distinguishes over the references.

In the Advisory Action (Continuation Sheet (PTOL-303); ¶1) mailed on November 3, 2004, the Examiner refers to the original specification at page 32, lines 7-10 ("By employing an electronic signature in the exemplary online rental process, the storage and retrieval of the electronic rental agreement and rental-related information is accomplished without printing, hand initialing, hand signing and scanning a physical rental agreement document.") The Examiner then states that Claim 1 "does not add limitations to meet the requirements of the electronic rental agreement without completing [a] handwritten rental agreement as disclosed in the application."

There is no requirement in the Patent Statute that a negative limitation must be included in a claim where the claim recital (*e.g.*, electronically accepting a rental proposal, and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal) patentably distinguishes over the prior art. Without waiving this argument, as is discussed below, Claim 18 expressly recites "completing and storing the electronic rental agreement based upon the accepted rental proposal without completing a handwritten rental agreement".

Also in the Advisory Action (Continuation Sheet (PTOL-303), ¶2), the Examiner argues, without support, that the cited references teach allowing customers to "accept rental proposals". In the final Office Action (page 5, ¶4), the Examiner argued that Hertz "discloses electronically accepting said rental proposal [page 68]". This position is not well taken since pages 17 and 67-69 of Hertz, which deal with a user confirming a reservation by clicking on a "Reserve" button (pages 67 and 68), show a "Reservation Confirmation" (page 69) and canceling a reservation (page 17). Furthermore, pages 67-68 of Hertz expressly state (emphasis added) that "[i]f you find that you do not need this reservation, please remember to cancel it ...". At best, these pages make clear that the customer has reserved the vehicle unless the reservation is cancelled by the customer and that Hertz remembers a unique reservation based upon an accepted reservation proposal. There is no teaching or

suggestion in the references of accepting a ***rental*** proposal, much less of electronically accepting a rental proposal, and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal.

Further in the Advisory Action (Continuation Sheet (PTOL-303), ¶3), the Examiner states that the cited references teach "storing of electronic agreements". Actually, the references teach or suggest storing of electronic reservation agreements. Here, the Examiner errs by not considering the refined recital of Claim 1 of electronically accepting a ***rental*** proposal, and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal.

Also in the Advisory Action (Continuation Sheet (PTOL-303), ¶5), the Examiner states that references teach allowing "customers to accept rental proposals (electronically signed)."

The Examiner errs on this point for similar reasons as were discussed above, namely, that the cited references teach allowing customers to accept reservation proposals electronically. Actually, the references teach or suggest electronically accepting a reservation proposal, and storing an electronic reservation agreement based upon an accepted reservation proposal. Here, again, the Examiner errs by not considering the refined recital of Claim 1 of electronically accepting a ***rental*** proposal, and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal.

To support a conclusion that a claimed combination is directed to obvious subject matter, either the references must suggest the claimed combination "or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references." *Ex parte Clapp*, 227 U.S.P.Q. 972, 973 (Bd. Pat. App. & Interferences 1985). A reservation agreement or a handwritten rental agreement as contemplated by the references are not an electronic rental agreement (*i.e.*, electronic rental contract, which is legally binding on the parties entering into it). The Examiner has not presented a convincing line of reasoning to support the rejection of Claim 1 in

view of the cited references. Accordingly, the rejection of Claim 1 should be reversed.

Claims 2-5, 10-12, 14-16 and 18 depend directly or indirectly from Claim 1 and patentably distinguish over the references for the same reasons.

Claim 4

Claim 4 recites entering at least some of the rental-related information from a master rental agreement; and allowing modification of the information from the master rental agreement for rental of the item or service without modifying the master rental agreement.

In the final Office Action (page 6, ¶4), the Examiner states that Hertz (pages 17 and 21) allows "customers to modify information from the master rental agreement for rental without modifying the master rental agreement". This position is not well taken. Hertz (page 17), which deals with making, modifying or canceling reservations online, and which discloses that a club member "can use some or all of the information (including the credit card number) contained in your rental profile", does not teach or suggest the refined recital of entering at least some of rental-related information from a master rental agreement, and allowing modification of such information from such master rental agreement for ***rental*** of an item or service ***without modifying*** a ***master rental agreement.***

Furthermore, Hertz (page 21), which discloses a "Hertz #1 Club Gold Reservation area", also does not teach or suggest the refined recital of entering at least some of rental-related information from a master rental agreement, and allowing modification of such information from such master rental agreement for ***rental*** of an item or service ***without modifying*** a ***master rental agreement.***

There is no teaching or suggestion in Hertz that a customer can modify information from a master rental agreement ***without modifying*** the master rental agreement. The Examiner does not dispute that Avis adds nothing to Hertz in this regard. Hence, Claim 4 further patentably distinguishes over the references.

In the Advisory Action (Continuation Sheet (PTOL-303), ¶4), the Examiner states that the cited references teach "rental clubs, and, customers can use some or all of the information contained in your rental profile." The Examiner also refers to the original specification (page 2, lines 26-28) ("It is known to provide a

master rental proposal and to accept such proposal, in handwriting, in order to provide a master rental agreement, such as a car rental club agreement.")

Here, the Examiner errs since the cited references do not teach or suggest, as was discussed above, that a customer can modify information from a master rental agreement ***without modifying*** the master rental agreement.

The Examiner also errs since Claim 4 includes all of the limitations of Claim 1 including electronically accepting a rental proposal, and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal. The statement from the Background Information of the original application deals with accepting a master rental proposal in handwriting, in order to provide a master rental agreement, such as a car rental club agreement. Hence, the Examiner's reliance on this statement is misplaced.

Claim 12

Claim 12, which depends from Claim 11, recites storing a flag along with the unique transaction in the database system to indicate that the accepted rental proposal is electronically signed.

In connection with this claim, the Examiner relies (final Office Action; page 7, ¶3) upon the "Reserve" button of Hertz (page 68). However, the Examiner identifies no structure in Hertz regarding any flag that is stored along with any unique transaction. Instead, the Examiner merely concludes that it is "inherent / obvious that Hertz stores a flag along with unique transaction in the database system that the accepted rental proposal is electronically signed". The Examiner bases this conclusion on pages 17 and 67-69 of Hertz, which deals with a user confirming a reservation by clicking on a "Reserve" button (pages 67 and 68), showing a "Reservation Confirmation" (page 69) and canceling a reservation (page 17). The Examiner further bases this conclusion on another conclusion that "customer has rented the vehicle unless it is cancelled by the customer [page 67, 68]". Actually, those pages of Hertz expressly state (emphasis added) that "[i]f you find that you do not need this reservation, please remember to cancel it ...". At best, these pages make clear that the customer has reserved the vehicle unless the reservation is cancelled by the customer and that Hertz remembers a unique reservation based upon an accepted

reservation proposal. Accordingly, Hertz does not teach or suggest the refined recital of storing a flag along with a unique transaction in a database system to indicate that an accepted ***rental*** proposal is ***electronically signed***. The Examiner does not dispute that Avis adds nothing to Hertz in this regard. Hence, for the above reasons, Claim 12 achieves more than a combination which any or all of the references taught or suggested, expressly or by reasonable implication.

Therefore, for the above reasons, Claim 12 further patentably distinguishes over the references.

In the Advisory Action (Continuation Sheet (PTOL-303), ¶7), the Examiner states that the cited references teach "allow[ing] customers to accept rental proposals (electronically signed)" and "teach customers can retrieve, modify, cancel reservation agreements." The Examiner's first point is not well taken for similar reasons as were discussed above in connection with Claim 1, namely, that the cited references teach allowing customers to accept reservation proposals electronically. The references teach or suggest electronically accepting a reservation proposal, and storing an electronic reservation agreement based upon an accepted reservation proposal. Here, again, the Examiner errs by not considering the refined recital of Claim 1 of electronically accepting a ***rental*** proposal, and storing an electronic ***rental*** agreement (*i.e.*, an electronic rental contract, which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal. On the second point, the Examiner is correct in that the cited references teach that customers can retrieve, modify and cancel reservation agreements.

Next, in the Advisory Action (Continuation Sheet (PTOL-303), ¶7), the Examiner takes the positions that the recital of storing a flag along with a unique transaction in a database system to indicate that an accepted rental proposal is electronically signed is: (1) "non-functional descriptive material that does not distinguish (define) over the applied prior art; and (2) that it would have been obvious that "business[es] are known to use flags to keep track of transactions (e.g. active, closed pending). The prior art stores data and is fully capable of storing the claimed type of data, this is the extend [sic] to which weight will be given to the claimed data."

Here, the Examiner errs by applying case law pertaining to non-functional data (*e.g.*, a "Printed Matter" doctrine; data stored on an article of

manufacture) to, for example, a functional method for completing and storing an electronic rental agreement employing a database system. The courts generally disfavor application of the Printed Matter doctrine, especially to data structures. In other words, an Examiner may not simply ignore claim limitations that distinguish the invention over the prior art because they were considered to be Printed Matter. *See In re Lowry*, 32 F.3d 1579, 32 U.S.P.Q.2d 1031 (Fed. Cir. 1994) (data structures are more than a mere abstraction). In *Lowery*, patent claims directed to a data structure for a data processing system had been rejected by the Board of Patent Appeals and Interferences under the Printed Matter doctrine. In reversing, the Federal Circuit stated:

> The printed matter cases have no factual relevance where "the invention as defined by the claims *requires* that the information be processed not by the mind but by a machine, the computer" *Id.* (emphasis in original). Lowry's data structures, which according to Lowry greatly facilitate data management by data processing systems, are processed by a machine. Indeed, they are not accessible other than through sophisticated software systems. The printed matter cases have no factual relevance here.

Lowry, 32 F.3d at 1583, 32 U.S.P.Q.2d at 1034 (emphasis in original). Here, Claim 12 expressly recites storing a flag along with the unique transaction in the recited database system to indicate that the accepted rental proposal is electronically signed. This recital involves no Printed Matter and no non-functional descriptive material. Accordingly, the Examiner's logic as applied to the first point is incorrect.

Furthermore, the Examiner's logic as applied to the second point is also incorrect. Although the Examiner might be correct that businesses employ flags to keep track of transactions, the Examiner errs by not considering the refined recital of Claim 12 of storing a flag along with the unique transaction in a database system to indicate that an accepted ***rental*** proposal is ***electronically signed***.

Claim 18

In the Advisory Action (Continuation Sheet (PTOL-303), ¶1), the Examiner ignores the refined recital of Claim 18 of completing and storing the electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon the accepted rental proposal without

completing a handwritten rental agreement. As was discussed above, at best, Hertz teaches and suggests completing and storing an electronic reservation agreement based upon an accepted reservation proposal without completing a handwritten reservation agreement. This is quite different than the refined recital of completing and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted ***rental*** proposal without completing a handwritten ***rental*** agreement. The Examiner does not dispute that Avis adds nothing to Hertz in this regard.

Although the Examiner states (final Office Action; page 9, ¶1) that he "reads rental agreement as an arrangement between parties regarding a course of action; a covenant", such a statement is unreasonable and overly broad as applied to the claims since it would cover, for example, a reservation arrangement between parties regarding a reservation course of action; a reservation covenant. Again, the Examiner errs by ignoring the meaning of electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) as employed by Claim 18.

Claim 18 depends from Claim 1 and includes all of the limitations thereof. At best, Hertz teaches and suggests completing and storing an electronic reservation agreement based upon an accepted reservation proposal without completing a handwritten reservation agreement. This is quite different than the refined recital of electronically accepting a rental proposal; and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal. This is also quite different than the refined recital of completing and storing an electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal ***without completing a handwritten rental agreement.*** As was discussed above, in connection with Claim 1, the references require a printed and hand-signed physical rental agreement.

The Examiner argues (final Office Action; page 9, ¶1) that Hertz (item 14 on page 33) teaches that "customer confirms any penalties associated with reservation". The reference Hertz, which deals with a reservation having a penalty clause, does not teach or suggest any electronic ***rental*** agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it). Instead, Hertz

teaches and suggests that Hertz and the customer have to have a reservation agreement at the time of reservation to accept the penalty clause. See, for example, Hertz (page 67), which states that "[a]pproximate rental charges are based on available information at time of reservation. Additional fees or surcharges may be applied at time of rental."

It is, therefore, crystal clear that there cannot be any "rental agreement" (*i.e.*, rental contract which is legally binding on the parties entering into it) because there is no meeting of the minds between Hertz and the user making the reservation as to an exact price for a rental. At best, there might be some unspecified price for a penalty since Hertz contemplates a guarantee or penalty if Hertz and the customer cancel the reservation and, thus, do not enter into a future rental agreement at the future time and place defined by the reservation.[4]

Claims 6-9, rejected under 35 U.S.C. § 103(a)

Claim 6

Claims 6-9 depend directly or indirectly from Claim 1 and patentably distinguish over Hertz, Avis and Coutts et al.[5] for the same reasons.

Claim 6 recites maintaining a history of rental information for prior rentals by a user, entering information from an identification of a user, and entering at least some of the rental-related information from the history based upon the information from an identification of a user without employing a master rental agreement. Coutts et al. (Abstract), which employs predictive technology to predict which banking service or banking services provided by the system the user is likely to

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[4] *See* footnote 2 (page 6).

[5] Coutts et al., which discloses (Abstract; col. 1, l. 65 through col. 2, l. 7) a self-service, automated teller (banking) machine system that permits a user to withdrawal a number of different cash amounts, print mini bank statements, display or print the user's account balance at the bank, request a full bank statement be sent to the user, and make a cash deposit, has nothing to do with any electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it), reservation-related information or rental-related information, and adds nothing to Hertz and Avis to render Claim 1 unpatentable. The Examiner does not dispute this point and, instead, argues (Advisory Action (Continuation Sheet (PTOL-303), ¶6), with respect to Claim 6, that Coutts et al. teaches the idea of "storing [a] customer transaction record in the system (historical data), employing a technique in which aspects of each user's previous behavior and transactions are recorded and are then used to predict what that user's probable requirements will be in future transactions."

request, has nothing to do with any rental agreement or any rental-related information. Accordingly, Coutts et al. does not teach or suggest the refined recital of maintaining a history of ***rental*** information for prior ***rentals*** by a user, entering information from an identification of a user, and entering at least some of ***rental***-related information from such history based upon such information from an identification of a user. Therefore, Claim 6 further patentably distinguishes over the references.

Claims 13 and 17, rejected under 35 U.S.C. § 103(a)

Claim 13

Claims 13 and 17 depend directly or indirectly from Claim 1 and patentably distinguish over Hertz, Avis and kioskcom.com[6] for the same reasons. Claim 13 depends directly from Claim 12 and indirectly from Claims 1, 10 and 11, includes all of the limitations of those claims, and provides employing the recited stored flag to enable allocation of an item or service at a kiosk. That stored flag indicates that the recited accepted rental proposal is ***electronically signed***.

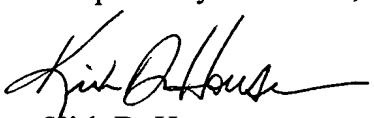
The cited reference kioskcom.com (page 1), which discloses airport kiosks to make air, hotel and car rental reservations, does not teach or suggest employing any stored flag, which indicates that an accepted rental proposal was electronically signed, to enable allocation of an item or service at a kiosk (or to "provide ... sales at locations convenient to customers" as was erroneously stated by the Examiner on page 13, ¶1 of the final Office Action). The Examiner clearly errs since the reference deals with reservations, not sales, and does not teach or suggest any accepted rental proposal. Accordingly, Claim 13 further patentably distinguishes over the references.

[6] The reference kioskcom.com (page 1), which discloses airport kiosks to make air, hotel and car rental reservations, adds nothing to Hertz and Avis regarding electronically accepting a rental proposal and storing an electronic rental agreement (*i.e.*, electronic rental contract which is legally binding on the parties entering into it) based upon an accepted rental proposal to render Claim 1 unpatentable. Furthermore, kioskcom.com, which deals with reservations, adds nothing to Hertz and Avis regarding storing a flag along with a unique transaction in a database system to indicate that an accepted rental proposal is electronically signed to render Claim 12 unpatentable.

Conclusion

Claims 1-18 are patentable over the prior art of record. Therefore, it is requested that the Board reverse the Examiner's rejections of Claims 1-18 and remand the application to the Examiner for the issuance of a Notice of Allowance.

Respectfully submitted,



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APPENDIX 1 (Claims Appendix)

1. A method for completing and storing an electronic rental agreement, said method comprising the steps of:

entering reservation-related information and rental-related information for an item or service, said entering step entering: (a) said rental-related information without employing a master rental agreement, or (b) at least some of said rental-related information from a master rental agreement and allowing modification of said information from the master rental agreement for rental of said item or service without modifying the master rental agreement;

providing a reservation for said item or service based at least in part upon said reservation-related information;

creating and displaying a rental proposal based upon said reservation and said rental-related information;

electronically accepting said rental proposal; and

storing the electronic rental agreement based upon said accepted rental proposal.

2. The method of Claim 1 further comprising:

entering said rental-related information without employing a master rental agreement.

3. The method of Claim 2 further comprising:

manually entering said rental-related information online.

4. The method of Claim 1 further comprising:

entering at least some of said rental-related information from a master rental agreement; and

allowing modification of said information from the master rental agreement for rental of said item or service without modifying the master rental agreement.

5. The method of Claim 4 further comprising:

entering at least one of a member identification and a user name to identify said master rental agreement.

6. The method of Claim 1 further comprising:

maintaining a history of rental information for prior rentals by a user;

entering information from an identification of a user; and

entering at least some of said rental-related information from the history based upon said information from an identification of a user without employing a master rental agreement.

7. The method of Claim 6 further comprising:

employing a driver's license as said identification of a user.

8. The method of Claim 1 further comprising:

maintaining a history of rental information for prior rentals by a user;

entering information from an identification of a user; and

provisionally entering at least some of said rental-related information from the history based upon said information from an identification of a user without employing a master rental agreement.

9. The method of Claim 8 further comprising:

modifying at least some of said provisionally entered at least some of said rental-related information from the history.

10. The method of Claim 1 further comprising:

sending a message to a database system responsive to said accepting step to indicate that a user has accepted said rental proposal.

11. The method of Claim 10 further comprising:

storing a unique transaction in the database system for said accepted rental proposal.

12. The method of Claim 11 further comprising:

storing a flag along with the unique transaction in the database system to indicate that the accepted rental proposal is electronically signed.

13. The method of Claim 12 further comprising:

employing said stored flag to enable allocation of said item or service at a kiosk.

14. The method of Claim 1 further comprising:

employing a plurality of rental options in said rental-related information;

accepting or declining at least some of said rental options; and

storing a plurality of flags corresponding to said rental options to signify the rental options that a user has accepted or declined.

15. The method of Claim 14 further comprising:

retrieving the stored flags; and

determining whether the user accepted or declined said rental options based upon the retrieved stored flags.

16. The method of Claim 1 further comprising:

electronically accepting said rental proposal at a client system.

17. The method of Claim 1 further comprising:

electronically accepting said rental proposal at a kiosk.

18. The method of Claim 1 further comprising:

completing and storing the electronic rental agreement based upon the accepted rental proposal without completing a handwritten rental agreement.

APPENDIX 2 (Evidence Appendix)

Webster's Third New International Dictionary, p. 43 (1993) (entered in the record by the Examiner with the Response filed on September 13, 2004; *see* Advisory Action mailed on November 3, 2004 (box 7.b)).

ag·nus dei \ˌägˌnüsˈdāˌē, -ˌnəs-, ˌänˌyüs-, -yüs-; *sometimes, when not sung,* -ˈdā; ˌagnəsˈdēˌī\ *n, usu cap A&D* [ME, fr. LL, lamb of God, trans. of Gk *Amnos tou Theou*] **1** : an image of a lamb, often with a halo and bearing a banner or a cross, symbolizing Jesus Christ **2** *Roman Catholicism* **a** : a small cloth-covered disk of wax stamped with the figure of a lamb, blessed by the pope, and carried or worn through devotion **b** : a prayer in the ordinary of the mass beginning with the words "Agnus Dei" **3** *Anglicanism* : a liturgical prayer or anthem beginning "O Lamb of God"

Agnus Dei 1

ago \əˈgō\ *also* **agone** \əˈgȯn *also* -ān\ *adj (or adv)* [ME *ago, agon,* fr. past part. of *agon* to go away, pass by, fr. OE *āgān* to pass away, fr. *ā-* (perfective prefix) + *gān* to go — more at ABEAR, GO] : gone by : PAST ⟨two days~⟩ ⟨he lived here long~⟩

agog \əˈgäg *also* -ȯg\ *adj* [MF *en gogues* merry, lively, lit., in mirth] : full of intense interest, ardent anticipation, or extreme excitement ⟨the abrupt announcement . . . left everybody ~ —Bennett Cerf⟩ : EAGER ⟨always ~ for news —Virginia Woolf⟩ **syn** see EAGER

ago·ge \əˈgōjē, -ōgē, ˌägōˈgā\ *n* -s [Gk *agōgē*, lit., act of carrying away, fr. *agein* to lead — more at AGENT] *Greek music* : rate of speed : TEMPO

agog·ic \əˈgäjik, -gōgik\ *adj* [G *agogisch*, fr. Gk *agōgē* + G *-isch* -ish] : of or relating to agoge or agogics esp. to variations in tempo within a piece or movement ⟨tempos and ~ indications of an operatic score⟩

agogic accent *n* : stress secured through relative prolongation of the tones to be emphasized — compare AGOGICS

agog·ics \-iks\ *n pl but usu sing in constr* [G *agogik*, fr. Gk *agōgē* + G *-ik* -ics] **1** : the musical theory that rhetorical emphasis involves not only dynamic stress but also the emphasis implied in the greater relative length of the tones to be emphasized — compare RUBATO **2** : the quantitative aspect of musical nuances involving all variations from the rigid basic meter (as of retard, pause, accelerando)

-a·gogue \ˌəˌgäg *also* -ˌgȯg\ *also* **-a·gog** \"\ *n comb form* -s [F & NL; F *-agogue*, fr. LL *-agogus* promoting the expulsion of, fr. Gk *-agōgos* leading, drawing forth, fr. *agein* to lead; NL *-agogon*, neut. of *-agogos* promoting the expulsion of, fr. Gk *-agōgos* — more at AGENT] : substance that promotes the secretion or expulsion of ⟨chol*agogue*⟩ ⟨lymph*agogue*⟩

ago·ho *or* **ago·jo** \əˈgōˌhō\ *n* -s [*agoho* fr. Tag *agohó*; *agojo* fr. PhilSp, fr. Tag *agohó*] : HORSETAIL TREE

agon \ˈäˌgōn, ˈäˈgōn, ˈaˌgän, ˈäˌgän\ *n, pl* **agons** \-nz\ *also* **ago·nes** \äˈgōˌnēs, əˈgō(ˌ)nēz\ [Gk *agōn*, lit., gathering, assembly, contest — more at AGONY] : a struggle or contest: as **a** : a contest in athletics, chariot or horse racing, music, or literature at a public festival in ancient Greece **b** : the dramatic conflict between the chief characters in a Greek play **c** : the struggle between protagonist and antagonist in a literary work ⟨the central ~ of the novel⟩

ag·o·nal \ˈagənᵊl\ *adj* [*agony* + *-al*] : of, relating to, or associated with agony, esp. the death agony or period of dying ⟨the ~ state⟩ ⟨~ leukocytosis⟩

ago·ni·a·da \əˌgōnēˈädə, -adə\ *or* **agoniada bark** *n* -s [Pg *agoniada*] : the bark of a tropical So. American shrub (*Plumieria lancifolia*) yielding plumieride

ago·ni·a·ti·tes \(ˌ)āˌgōnēəˈtīd·(ˌ)ēz, əˌg-\ *n, cap* [NL, fr. ²*a-* + *Goniatites*] : a genus of Devonian ammonoid mollusks (family Goniatitidae)

agon·ic \(ˈ)āˈgänik, əˈg-\ *adj* [Gk *agonos* without angle (fr. *a-* ²*a-* + *gonia* angle, corner) + E *-ic*] : not forming an angle

agonic line *n* : an imaginary line on the earth's surface connecting the north and south magnetic poles and passing through those points where there is no magnetic declination and where a freely suspended magnetic needle indicates true north — compare ACLINIC LINE, ISOGONIC LINE

agon·i·dae \əˈgänəˌdē\ *n pl, cap* [NL, fr. *Agonus*, type genus + *-idae*] : a family of small slender fishes (order Scleroparei) having the body covered with overlapping striated often spiny plates

ag·o·nist \ˈagənəst\ *n* -s [LL *agonista*, fr. Gk *agōnistēs* combatant, fr. *agōnizesthai* to contend, fr. *agōn* gathering, assembly, contest — more at AGONY] **1** : one that is engaged in a struggle: as **a** : a leading character (as the protagonist) in a literary work ⟨the chief interest of the novel . . . is an analysis of the nature and moods . . . of the four ~*s* —Iris Barry⟩ **b** : one that is beset by intellectual or spiritual conflicts ⟨an ~, a self-tormentor who ran to meet suffering halfway —John Buchan⟩ **2** [back-formation fr. *antagonist* "a muscle"] : a muscle that on contracting is automatically checked and controlled by the opposing simultaneous contraction of another muscle — see ANTAGONIST 2a; compare SYNERGIST

ag·o·nis·tic \ˌagəˈnistik\ *also* **ag·o·nis·ti·cal** \-tə̇kəl\ *adj* [LL *agonisticus* of a contest, fr. Gk *agōnistikos* fit for combat, contentious, fr. *agōnistēs* + *-ikos* -ic, -ical] **1** : of or relating to the athletic contests of ancient Greece ⟨~ inscriptions⟩ **2** : seeking to overcome in discussion or debate : ARGUMENTATIVE ⟨a dialectical and ~ approach to knowledge⟩ **3** : striving for effect : STRAINED ⟨~ poses⟩ — **ag·o·nis·ti·cal·ly** \-tə̇k(ə)lē\ *adv*

ag·o·nize \ˈagəˌnīz, ˈaig-\ *vb* -ED/-ING/-S *see -ize in Explan Notes* [MF *agoniser* to be in agony, fr. LL *agonizare*, fr. Gk *agōnizesthai*, fr. *agōnia* agony — more at AGONY] *vi* **1** : to cause to suffer agony : TORTURE ⟨he *agonized* himself with the thought —Aldous Huxley⟩ ~ *vi* **1** : to suffer agony or torture : be in great pain or anguish ⟨who *agonized* and prayed and yet could not secure release from their guilt —Lillian Smith⟩ **2** : to try desperately : STRUGGLE ⟨strive to do and ~ to do and fail in doing —Robert Browning⟩ **syn** see WRITHE

agonized *adj* : characterized by, suffering, or expressing agony ⟨an ~ search⟩ ⟨an ~ father⟩ ⟨an ~ cry⟩ — **ag·o·niz·ed·ly** \-zədlē, -lī\ *adv*

agonizing *adj* : causing agony : PAINFUL ⟨an ~ reappraisal of the role and the future of the French Empire —D.W.Brogan⟩ — **ag·o·niz·ing·ly** *adv*

ag·o·nos·to·mus \ˌagəˈnästəməs\ *n, cap* [NL, fr. Gk *agōnos* without angle + NL *-stomus*] : a genus of tropical freshwater mullets of the East and West Indies and Mexico much used as food

agon·o·thete \əˈgänəˌthēt\ *n, pl* **agonothetes** \-ēts\ *or* **ag·o·noth·e·tae** \ˌagəˈnäthəˌtē, -ˌtī\ [LL *agonotheta*, fr. Gk *agōnothetēs*, fr. *agōn* + *-thetēs* (fr. *tithenai* to appoint, make, do) — more at DO] : the judge or director of public games in ancient Greece

ag·o·ny \ˈagənē, ˈaig-, -ni\ *n* -ES [ME *agonie*, fr. MF & LL; MF *agonie*, fr. LL *agonia*, fr. Gk *agōnia* contest, struggle, anguish, fr. *agōn* gathering, assembly at games, contest for a prize, fr. *agein* to lead, celebrate — more at AGENT] **1 a** : intense pain of mind or spirit : extreme distress : ANGUISH ⟨the ~ of being found wanting and exposed to the disapproval of others —Margaret Mead⟩ **b** *often cap* : the sufferings of Jesus in the garden of Gethsemane ⟨and being in an ~ he prayed more earnestly —Lk 22:44 (AV)⟩ **2 a** : intense pain of body : extreme torment : TORTURE ⟨left arm twisted upward behind him . . . in slow, deliberate ~ —Kay Boyle⟩ **b** : the throes of death : death struggle ⟨his final ~⟩ **3** : a violent struggle, conflict, or contest ⟨the world is convulsed by the *agonies* of great nations —T.B.Macaulay⟩ **4** : a strong sudden and often uncontrollable display (as of joy or delight) : OUTBURST ⟨my cousin . . . in an ~ of mirth —Edith Wharton⟩ **syn** see DISTRESS

agony column *n* : a newspaper column of personal advertisements relating esp. to lost objects, missing relatives or friends, and marriage separations

agood [¹*a-* + *good* (adj.1)] *obs* : in earnest : HEARTILY

ag·o·ra \ˈagərə\ *n, pl* **agoras** \-rəz\ *or* **ago·rae** \-ˌrē, -ˌī\ [Gk, fr. *ageirein* to assemble — more at GREGARIOUS] : a gathering place or assembly; *esp* : the market place in ancient Greek cities usu. surrounded by public buildings and porticoes and serving as a center for assembly, trade, and public life

of open spaces — contrasted with *claustrophobia* — **ag·o·ra·pho·bic** \ˌ⸗⸗⸗ˈfōbik *also* -äb-\ *adj*

agoua·ra *also* **agua·ra** \ˌagwəˈrä\ *n* -s [Pg *aguara* & Sp *aguará*, fr. Guarani *aguará*] **1** : any of several So. American wild dogs (genus *Chrysocyon*) **2** : CRAB-EATING RACCOON

¹**agou·ti** *also* **agou·ty** \əˈgüd·ē, -ütē, -i\ *n, pl* **agoutis** *also* **agouties** [F *agouti*, fr. Sp *agutí*, fr. Guarani *acutí, agutí*] **1** : a rodent of the genera *Dasyprocta* and *Myoprocta* being about the size of a rabbit and brownish or grizzled in color and peculiar to So. and Central America and the West Indies **2 a** : a grizzled color of the fur or hair of many rodents (as wild guinea pigs, rats, mice, and squirrels) consisting of the barring of each hair in several alternate dark and light bands blackish blue or brown at the base and yellowish at the tip **b** : an agouti-coated animal

²**agouti** \"\ *adj* : characterized by or bearing the color agouti

ag·pa·ite \ˈagpəˌīt\ *n* -s [*Agpa*, locality in southern Greenland + E *-ite*] : any of a group of feldspathoid rocks (as naujaites, lujauvrites, or kakortokites) from Ilimausak, Greenland, which differ from normal nephelite-syenites in having alumina in excess of the alkalies — **ag·pa·it·ic** \ˌ⸗⸗ˈid·ik\ *adj*

agr *abbr* agriculture

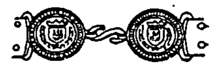
¹**agra** \əˈgrō\ *n* -s [IrGael *a grādh*, fr. *a* oh + *grādh* love, fr. MIr *grād*; akin to L *gratus* beloved, dear — more at GRACE] *Irish* : my dear : SWEETHEART

²**agra** \ˈägrə\ *adj, usu cap* [fr. *Agra*, India] : of or from the city of Agra, India : of the kind or style prevalent in Agra

³**agra** \"\ *n* -s *usu cap* [fr. *Agra*, India, where it is made] : a carpet usu. distinguished by thick pile and heavy knotting

-ag·ra \ˈagrə, ˈaig- *sometimes* ˈäg-\ *n comb form, pl* **-ag·rae** \-ˌgrē\ *also* **-agras** [ME, fr. L, fr. Gk, fr. *agra* hunting, catch; akin to W *aer* war, L *agere* to drive — more at AGENT] : seizure of pain (cardi*agra*) ⟨mel*agra*⟩

agrafe *or* **agraffe** \əˈgraf\ *n* -s [F *agrafe*, fr. *agrafer* to hook, fasten, fr. MF, fr. *a-* (fr. L *ad-*) + *grafer* to hook, fr. *grafe* hook, fr. OHG *krāpfo*; akin to OHG *krampfo* hook — more at CRAMP] **1** : a hook-and-loop fastening; *esp* : an ornamental clasp used on armor or costumes ⟨an ~ set with pearls⟩ **2** : a hook, eyelet, or other device by which a piano wire is so held as to prevent the section between the pin and the bridge from vibrating **3 a** : a cramp used in building to hold stones together **b** : relief sculpture put upon the head of an arch **4** : the iron clamp used to secure the cork in a champagne bottle or the closure in any jug, bottle, or carboy



agrafe 1

agra gauze \ˈägrə-\ *n, usu cap A* [fr. *Agra*, India, where it was made] : a silk gauze with stiff finish used for trimming

agram·ma·tism \(ˈ)āˈgraməˌtizəm\ *n* -s [ISV *agrammat-* (fr. Gk *agrammatos* illiterate, fr. *a-* ²*a-* + *grammat-*, *gramma* letter) + *-ism*; orig. formed as G *agrammatismus* — more at GRAMMAR] : the pathologic inability to use words in grammatical sequence

agran·u·lo·cyte \(ˈ)āˈgranyələˌsīt\ *n* -s [ISV ²*a-* + *granulo-* + *-cyte*] : a leukocyte without cytoplasmic granules : a lymphocyte or monocyte — compare GRANULOCYTE

agran·u·lo·cyt·ic angina \ˌ⸗⸗⸗ˈsid·ik-\ *n* : GRANULOCYTOPENIA

agranulocytosis \ˌ⸗⸗⸗ˌsīˈtōsəs\ *n, pl* **agranulocyto·ses** \-ōˌsēz\ [NL, fr. ²*a-* + E *granulocyte* + NL *-osis*] **1** : GRANULOCYTOPENIA **2** *Brit* : PANLEUCOPENIA

ag·ra·pha \ˈagrəfə\ *n pl* [Gk, neut. pl. of *agraphos* unwritten, fr. *a-* ²*a-* + *-graphos* (fr. *graphein* to write) — more at CARVE] : sayings of Jesus unrecorded in the canonical gospels but found in other parts of the New Testament or in early Christian writings

agraph·ia \(ˈ)āˈgrafēə\ *n* -s [NL, fr. ²*a-* + *-graphia* -graphy] : the pathologic loss of the ability to write — **agraph·ic** \(ˈ)āˈgrafik\ *adj*

¹**agrar·i·an** \əˈgrerēən, -ra(ə)r-, -rär-\ *adj* [L *agrarius* (fr. *agr-*, *ager* field + *-arius* -ary) + E *-an* — more at ACRE] **1** : of or relating to the land or landed property ⟨a policy of ~ redistribution was sketched out —G.A.Craig⟩ **2 a** : of, by, or characteristic of the farmer or his way of life ⟨the application of ~ virtues to . . . industrial economy —Lloyd Morris⟩ **b** : organized or designed to promote agricultural interests ⟨an ~ party drawing its original impulse from the grain growers and dairymen —H.R.Penniman⟩ **3** : growing wild in fields : CAMPESTRAL — **agrarianly** *adv*

²**agrarian** \"\ *n* -s *often cap* : one who favors agrarianism; *esp* : a member of an agrarian party or movement

agrar·i·an·ism \-ˌnizəm\ *n* -s **1 a** : the doctrine of an equal division or equitable redistribution of landed property **b** : a social or political movement designed to bring about land reforms or to improve the economic status of the farmer **2** : the way of life associated with a farm economy and country towns in contrast to that associated with an industrial economy

agré·a·tion \ˌägrāäsyōⁿ\ *n* -s [F, lit., approval, fr. *agréer* to agree + *-ation*] : a diplomatic procedure by which a state determines in advance whether a proposed envoy will be acceptable to the receiving state — compare AGRÉMENT

agree \əˈgrē\ *vb* **agreed; agreed; agreeing; agrees** [ME *agreen*, fr. MF *agreer*, fr. *a-* (fr. L *ad-*) + *gré* will, pleasure, fr. L *gratum*, neut. of *gratus* beloved, dear, agreeable — more at GRACE] *vt* **1 a** : to concur in (as an opinion) : ADMIT ⟨all *agreed* that he was a man of stature⟩ **b** : to indicate willingness : CONSENT ⟨~ to abide by the interpretation of the court —M.R.Cohen⟩ **2** *chiefly Brit* **a** : to settle upon by arrangement : ARRANGE ⟨the following articles were *agreed* —Sir Winston Churchill⟩ **b** : to bring into settlement ⟨they have *agreed* their quarrel⟩ ~ *vi* **1** : to give assent : express approval : ACCEDE — usu. used with *to* or *with* and sometimes with *in* ⟨~ to a plan⟩ ⟨~ with an opinion⟩ ⟨I ~ . . . in . . . what you say —Benjamin Jowett⟩ **2 a** : to achieve harmony (as of opinion, feeling, or purpose) : become of one mind ⟨no two of his admirers would . . . ~ in their selection of characteristic passages —Bliss Perry⟩ ⟨~ with classical antiquity in deeming a figure of speech to be worth frequent use —C.E. Montague⟩ **b** : to live or act together harmoniously : get along together ⟨the two managed to ~ fairly well and the next month passed very pleasantly —Elinor Wylie⟩ **c** : to reach a harmonious understanding : come to terms — usu. used with *on* or *upon* ⟨~ on a fair division of the profits⟩ ⟨the means of settling the dispute were finally *agreed* upon⟩ **3 a** : to be similar : CORRESPOND — used with *with* ⟨the photographs ~ exactly with the originals⟩ **b** : to resemble one another : correspond to each other ⟨the accounts of the wreck did not ~⟩ **c** : to be consistent or consonant : HARMONIZE — used with *with* ⟨popular poetry . . . *agreed* with the favorite fiction . . . in attitude —J.D.Hart⟩ **4 a** *obs* : to react suitably, pleasingly, or healthfully — used with *with* ⟨your appetites and your digestions do not ~ with it —Shak.⟩ **b** : to be fitting, pleasing, or healthful : SUIT — used with *with* ⟨a dry climate will ~ with the patient⟩ ⟨onions don't ~ with everyone⟩ **5** : to have an inflectional form denoting either identity or some regular correspondence other than identity in such grammatical categories as gender, number, case, or person ⟨the German verb ~*s* with its subject in person and number⟩ ⟨the Latin adjective ~*s* with its noun in gender, number, and case⟩ ⟨in classical Greek a verb in the third person singular ~*s* with a neuter plural subject⟩

syn CONCUR, COINCIDE: AGREE suggests an accord, harmony, or compatibility arrived at by a settling of differences, as in the making of a truce, or by acquiescence where there was or might have been opposition or contention ⟨*agree* upon a price⟩ ⟨I will presume that Mr. Murry and myself can *agree* that for our purposes these counters are adequate —T.S.Eliot⟩ CONCUR suggests a thinking, acting, or functioning cooperatively or harmoniously toward a given end or for a given purpose ⟨for the creation of a masterwork of literature two powers must *concur*, the power of the man and the power of the moment —Matthew Arnold⟩ ⟨all those who have been concerned in the administration of our finances have *concurred* in representing its importance or necessity —John Marshall⟩ COINCIDE emphasizes the identity or precise accord of nature, function, groups whose interests did not *coincide* with national defense —T.W.Arnold⟩ ⟨the hearty tones natural when the words demanded by politeness *coincide* with those of deep feeling —Thomas Hardy⟩

syn TALLY, SQUARE, CONFORM, CORRESPOND, HARMONIZE, ACCORD, JIBE: AGREE is a general term indicating a going, fitting, or matching together without significant difference, contradiction, or conflict ⟨in general, the two accounts *agree*⟩ ⟨their findings *agree* with his⟩ TALLY suggests an agreement like that between two correct sets of accounts or records matching in both itemized details and overall conclusions ⟨one thing must match another or representation must *tally* with thing represented, like items in a tradesman's account —R.M. Weaver⟩ SQUARE suggests an exact agreeing, as if one item could perfectly fit with the form or shape of another ⟨these two assertions *square* with orthodox tradition —T.S.Omond⟩ ⟨the facts of history exist; but they hardly trouble us. We select and interpret our documents till they *square* with our theories —Aldous Huxley⟩ CONFORM suggests an essential agreement in form or in action, nature, or import making differences or deviations unimportant ⟨a widely diffused popular story of a fairy wife or husband which *conforms* to the type known as the Swan Maiden, or Beauty and the Beast, or Cupid and Psyche —J.G.Frazer⟩ ⟨and since theology was philosophy's queen, medieval philosophy *conformed* to that system which Augustine employed in his theology —H.O.Taylor⟩ CORRESPOND may be used to indicate the matching of far-apart or dissimilar things in falling into the same category or in being analogous, as well as to apply to closely similar items ⟨remind ourselves that ideas and images and thoughts are merely the objects that *correspond* to certain impulses and conations of our own —Samuel Alexander⟩ ⟨conjurers, who *correspond* to the Siberian shamans, affect the usual mystery of the priestly craft —Edward Clodd⟩ HARMONIZE suggests a matching, juxtaposing, or combining agreeably or pleasurably without jarring or grating ⟨the advantage of the Ptolemaic scheme, complicated though it was, was that it *harmonized* fairly well with the observable phenomena of the heavens —G.C.Sellery⟩ ⟨such mortal impulses were so very difficult to *harmonize* with the eternal beatitude which consisted in the cognition and love of God —H.O.Taylor⟩ ACCORD suggests a general compatibility, a capacity for fitting, matching, or accompanying without friction, discord, difficulty ⟨the common doctrine of liberty *accorded* with the passions released by the Revolution —V.L. Parrington⟩ ⟨the splendid moving ritual, with a Queen who so perfectly *accorded* with its spirit, lifted the people of Britain out of their normal selves —*Britain Today*⟩ JIBE is more colloquial than the preceding; it suggests matching, fitting, or accord without serious difficulty or contradiction ⟨that the attempts at "reconciliation" were futile, that common sense and science simply wouldn't *jibe*, was not Mill's fault —Gail Kennedy⟩ **syn** see in addition ASSENT

agree·a·bil·i·ty \əˌgrēəˈbiləd·ē, -ətē, -i\ *n* -ES : the quality or state of being agreeable

¹**agree·a·ble** \əˈgrēəbəl\ *adj* [ME *agreable*, fr. MF, fr. *agreer* + *-able*] **1 a** : pleasing to the mind or senses : to one's liking : PLEASANT ⟨an ~ manner⟩ ⟨an ~ garden⟩ ⟨~ people⟩ ⟨an occupation ~ to his tastes⟩ **b** *of an odor* : FRAGRANT **2** : ready or willing to agree or consent : favorably disposed ⟨~ to the plan⟩ **3** : in harmony or keeping : CONSISTENT, CONSONANT ⟨the theory . . . was ~ to the general evolutionary conceptions of the period —S.F.Mason⟩ **syn** see PLEASANT

²**agreeable** \"\ *n* -s : an agreeable person or thing — usu. used in pl. ⟨superficial advantages and outside ~*s* —S.T.Coleridge⟩

agree·a·ble·ness *n* -ES : AGREEABILITY

agreeable to *prep* : in accordance with the requirements of : as provided by : according to ⟨chose officers *agreeable to* the laws of that province —*Amer. Guide Series: Vt.*⟩

agree·a·bly \-blē, -li\ *adv* [ME *agreeably, agreably*, fr. *agreable* + *-ly*] **1** : in an agreeable manner : PLEASANTLY **2** *obs* : in the same way : SIMILARLY

agreeably to *prep* : in conformity with : as provided by : according to ⟨disobedience of orders in not attacking the enemy . . . *agreeably to* repeated instructions —H.E.Scudder⟩

agreed *past of* AGREE

agreed case *n* : CASE STATED

agreed rate *n* : an esp. low rate granted by a carrier to a shipper in return for the allocation of a high proportion of the shipper's freight to that carrier

agreed valuation *n* : the value of articles or shipments agreed upon by shipper and carrier in order to obtain a specific rating or limited liability — compare RELEASED VALUATION

agreed weight *n* : the weight per package or unit agreed upon by shipper and carrier to avoid weighing each package or unit

agreeing *pres part of* AGREE

agreeingly *adv* : in an agreeing manner

agree·ment \əˈgrēmənt\ *n* -s [ME *agrement*, fr. MF, fr. *agreer* to please, agree + *-ment* — more at AGREE] **1 a** : the act of agreeing or coming to a mutual arrangement ⟨never any solemn ~ amongst themselves —John Locke⟩ **b** : oneness of opinion, feeling, or purpose : harmonious understanding : CONCORD ⟨with which religious tradition . . . must come to some sort of ~ —W.R.Inge⟩ **c** : the state of agreeing or being in accord : HARMONY, CORRESPONDENCE ⟨~ between the measured ionospheric data and the indications of practical communication experience —*London Calling*⟩ **2 a** : an arrangement (as between two or more parties) as to a course of action ⟨entered into an ~ . . . to assist in planting a colony —R.J.Stanley⟩ **b** : a compact entered into by two or more nations or heads of nations : COVENANT, TREATY **3 a** : a contract duly executed and legally binding on the parties entering into it — see CONTRACT, MEETING OF THE MINDS **b** : the written or oral phraseology embodying reciprocal promises **c** : the written instrument that is the evidence of an agreement **4** : the fact of agreeing grammatically ⟨the ~ of the English personal pronoun with its antecedent in gender and number⟩

agrees *pres 3d sing of* AGREE

agré·ga·tion \ˌägrāgäsyōⁿ\ *n, pl* **agrégations** \"\ *n* -s [F, lit., admittance, fr. ML *aggregation-*, *aggregatio* act of collecting, fr. L *aggregatus* (past part. of *aggregare*) + *-ion-*, *-io* -ion] : a competitive examination given at French universities which must be passed for admission to the rank of agrégé

agré·gé \ˌägrāzhā, -rezhā\ *n, pl* **agrégés** \"\ [F, fr. past part. of *agréger* to admit (influenced in meaning by *agrégation*), fr. L *aggregare* to add to — more at AGGREGATE] : an academic rank conferred by a French university on one who has passed a rigidly competitive examination and who is therefore entitled to appointment to the highest teaching post in a lycée or in one of the faculties of a university

agré·mens \ˌägrāmäⁿ\ *or* **agré·ments** *n pl* [F *agréments* (formerly also spelled *agrémens*), pl. of *agrément* pleasure, ornament, agreement, approval — more at AGREEMENT] : AMENITIES ⟨the ~ of social life⟩

agré·ment \ˌägrāmäⁿ\ *n, pl* **agréments** \"\ [F] **1** : GRACE NOTE, ORNAMENT **2** : the approval of a diplomatic representative by the state to which he is to be accredited — compare AGRÉATION

agres·tal \əˈgrestᵊl\ *or* **agres·tial** \-es(h)chəl\ *adj* [L *agrestis* (fr. *agr-*, *ager* field) + E *-al*] : dwelling or growing wild in the fields : WILD

agres·tic \-stik\ *adj* [L *agrestis* + E *-ic*] : of or relating to the fields or country : RUSTIC

ag·ri·business \ˈagrə,ˈaigrə+ˌ-\ *n* [blend of *agriculture* and *business*] : a combination of the producing operations of a farm, the manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities

ag·ri·cere \ˈagrəˌsi(ə)r\ *n* -s [L *agri* (gen. of *ager* field) + *-cere* (fr. *cera* wax) — more at ACRE, CERE] : a waxy or resinous coating of organic matter on soil particles

agric·o·lite \əˈgrikəˌlīt\ *n* -s [G *agricolit*, fr. Georgius *Agricola* (Georg Bauer) †1555 Ger. mineralogist + G *-it* -ite] : monoclinic bismuth silicate : EULYTITE

ag·ri·cul·tur·al \ˌagrəˈkəlch(ə)rəl, ˌaig-\ *adj* **1 a** : of, relating to, or used in agriculture ⟨~ production⟩ ⟨~ equipment⟩ **b** : characterized by or engaged in farming as the chief occupation ⟨an ~ community⟩ **c** : founded or designed to promote

APPENDIX 3 (Other Authorities Appendix)

Copies are attached as suggested by 37 CFR § 41.12(b).

be controlling. In that case the supreme court held that where the lease so provided, the lessor could terminate the lease upon default by simply giving the lessee notice thereof. The court observed:

> A lease may be terminated either by statutory landlord and tenant proceedings or by compliance with stipulations incorporated in the written lease by the parties themselves. In this instance the lessor followed the latter procedure and was entitled to do so.

84 So.2d at 328. In the instant case, however, the lease did not contain such a provision. Moreover, Hiett did not purport to terminate the lease by giving notice to the Clarks but rather elected to pursue the statutory landlord and tenant proceedings. *6701 Realty* was a suit in circuit court, so the question of whether the lessor was required to give notice under section 83.20(2) was irrelevant.

[1] There is authority for the proposition that the three-day notice provided in section 83.20(2) can be expressly waived in the lease. *Moskos v. Hand*, 247 So.2d 795 (Fla. 4th DCA 1971). However, there is nothing in the instant lease which either expressly or impliedly waives the necessity of this notice. The requirement of paragraph 4 to give written notice of any default other than the payment of rent is to alert the lessee to the nature of his failure of performance before putting him in default. Subsection (c) simply gives the lessor the option to institute a suit to terminate the lease. This provision has nothing to do with the waiver of the statutory notice.

[2] By having brought suit for eviction in county court, Hiett became bound by the statutory provisions applicable to that proceeding. The three-day notice under section 83.20(2) was a condition precedent to relief. Since Hiett failed to give the three-day notice, the county court properly entered judgment against him. The circuit court departed from the essential requirements of law in holding otherwise.

We grant the petition for certiorari and direct that the circuit court affirm the judgment of the county court.

SCHEB and SCHOONOVER, JJ., concur.

Antoinette L. BELITZ, Trustee, Appellant,

v.

Bernard Frank RIEBE and Joyce Riebe, his wife, Appellees.

No. 85-1526.

District Court of Appeal of Florida, Fifth District.

Sept. 11, 1986.

Rehearing Denied Oct. 6, 1986.

Buyers of real property held in trust filed suit against trustee to obtain specific performance of land sale contract. The Circuit Court, Lake County, Ernest C. Aulls, Jr., J., reformed contract to include deed restrictions that were initially proposed and entered judgment of specific performance of contract as reformed. Trustee appealed. The District Court of Appeal, Upchurch, C.J., held that deed restrictions were material to agreement and trial court could not order specific performance in absence of agreement as to those provisions.

Reversed.

1. Reformation of Instruments ⇐20

While court may reform contract if it fails to express parties' intentions because of fraud, mutual mistake, accident, or inequitable conduct, it has no right to write contract for parties where none exists.

2. Reformation of Instruments ⇐47

Circuit court could not order specific performance of land sale contract as reformed to include originally proposed deed restrictions, notwithstanding that party's submission of subsequent deed restrictions was bad-faith attempt to avoid that agreement; deed restrictions were material part of proposed contract, which could not exist until they were agreed upon.

Marvin L. Beaman, Jr., of Marvin L. Beaman, Jr., P.A., Winter Park, for appellant.

William H. Morrison, of William H. Morrison, P.A., Altamonte Springs, for appellees.

UPCHURCH, Chief Judge.

This is an appeal from a judgment for specific performance of a land sale contract. The basic question presented is whether there was a contract which the court could enforce.

Appellant Belitz was trustee of real property in Lake County. The trust beneficiaries were four family members of Belitz and two non-family members, one an attorney and the other a Realtor.

After Belitz negotiated and exchanged several offers and counter offers with appellees Bernard and Joyce Riebe, the agreement in question was accepted. The agreement included the following provision: "Subject to buyer and seller agreeing on deed restrictions provided that none of the foregoing shall prevent use of the property for the purpose of building single family house" (underlined portion handwritten). No specific list of restrictions was discussed, although the parties met and generally discussed some restrictions.

The trust beneficiaries were not pleased with the agreement because the price was significantly lower than the appraised value. On July 8, 1983, a meeting was called by Belitz during which the Riebes were asked if they would just drop the contract. At this meeting, the agents for Belitz presented the Riebes with a set of proposed deed restrictions. These restrictions, according to Mrs. Riebe, were acceptable with a few modifications. The modifications were not acceptable to Belitz and a new list was prepared. Altogether three sets of restrictions were proposed, each set becoming more severe and the negotiations ended.

The Riebes filed suit to obtain specific performance, damages and reformation of the contract, to set usual and customary deed restrictions, or, in the alternative, to reform the contract by deletion of the requirement of deed restrictions. The trial court entered final judgment reforming the contract to provide that the deed restrictions were the same restrictions as first submitted by Belitz and modified by the Riebes. The final judgment also provided that the contract as reformed was to be specifically performed.

Belitz contends that there was no meeting of the minds as to the deed restrictions and that the lack of these essential terms renders the contract indefinite, uncertain and incapable of specific performance. *See Farrell v. Phillips*, 414 So.2d 1119 (Fla. 4th DCA 1982); *Brickell Townhouse, Inc. v. Hirschfield*, 404 So.2d 153 (Fla. 3d DCA 1981), *rev. denied*, 412 So.2d 466 (Fla.1982). Belitz concludes that a court has no power to supply an agreement which was never made nor to supply material terms or provisions omitted by the parties.

[1, 2] The Riebes argue that equity has power to reform instruments to prevent manifest injustice and to express the intent of the parties. *Spear v. McDonald*, 67 So.2d 630 (Fla.1953); *Nielsen v. Paneil, Inc.*, 202 So.2d 894 (Fla. 4th DCA 1967). A court will reform a contract if it fails to express the parties' intentions because of fraud, mutual mistake, accident or inequitable conduct. *Malt v. R.J. Mueller Enterprises, Inc.*, 396 So.2d 1174 (Fla. 4th DCA 1981); *Hardaway Timber Co. v. Hansford*, 245 So.2d 911 (Fla. 1st DCA 1971); 9 Fla.Jur.2d *Cancellation, Reformation and Rescission of Instruments*, § 72.

The Riebes argue that by failing to negotiate in good faith over the deed restrictions, Belitz acted inequitably. The Riebes point out that where the cooperation of a

party is a prerequisite to performance under the contract, there is an implied promise that the party will give the necessary cooperation. *Casale v. Carrigan and Boland, Inc.*, 288 So.2d 299 (Fla. 4th DCA), *cert. dism*, 301 So.2d 100 (Fla.1974). *See also Hanover Realty Corp. v. Condomo*, 95 So.2d 420 (Fla.1957); *Sharp v. Williams*, 141 Fla. 1, 192 So. 476 (1939). There is little doubt that after submission of the initial list of restrictions, which the Riebes did not accept, Belitz made no attempt to negotiate further in good faith. The subsequent lists were transparent attempts to avoid the agreement.

However, a court has no right to write a contract for parties where none exists. We conclude that the deed restrictions were a material part of the proposed agreement. Until they were agreed upon no contract existed and the court could not supply them for the parties. Ordinarily deed restrictions are dictated by the seller and the buyer is free to accept or reject them. Until there is an acceptance, there can be no contract. This proposed agreement was nothing more than an "agreement to agree" and could not be enforced.

REVERSED.

COBB and COWART, JJ., concur.

Geraldine Lavern AUSTIN and Phyllis Lowery, Appellants,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Appellee.

No. BM-132.

District Court of Appeal of Florida, First District.

Sept. 16, 1986.

Rehearing Denied Oct. 29, 1986.

Rule proposed by Department of Health and Rehabilitative Services, requiring that applicants for public assistance cooperate with child support enforcement unit in identifying, locating and establishing paternity of parents of children for whom public assistance is received, including requirement that parent cooperate by assisting in establishing paternity of child born out of wedlock, was challenged as invalid exercise of delegated legislative authority. The validity of the rule was upheld by hearing officer of the Division of Administrative Hearing. On appeal, the District Court of Appeal, Ervin, J., held that rule defining noncooperation to include situations in which mother identifies one or more men as putative fathers, but scientific tests indicate that none of men identified could in fact have been father of child, did not overrule prior District Court of Appeal decision invalidating policy used by Department to sanction welfare mothers who failed to cooperate in identifying fathers of their children.

Affirmed.

Social Security and Public Welfare
⇐194.11

Proposed rule of Department of Health and Rehabilitative Services requiring parent applying for public assistance to cooperate by assisting in establishing paternity of child born out of wedlock, and defining noncooperation to include situations in which mother identifies one or more men as putative fathers, but scientific tests indicate that none of men identified could in fact have been father of child, did not create irrebuttable presumptions from negative test results that man was not child's father and that mother had refused to cooperate, in violation of prior case law, given requirements of fair hearing and discretion of public assistance unit. West's F.S.A. § 409.2572; Social Security Act, § 402(a)(26)(B), as amended, 42 U.S.C.A. § 602(a)(26)(B).

Sarah H. Bohr, Jacksonville Area Legal Aid, Inc., Jacksonville, Melanie Malherbe,

cell, 296 N.C. 728, 252 S.E.2d 772 (1979), we have some doubt as to whether the former question was sufficiently specific. (In *Purcell*, the court held improper the questioning of the defendant as to whether he had "ever killed anybody.") Even if this question was improper, however, we do not find it to have been a prejudicial error. In view of the evidence of defendant's guilt we do not believe that this one question about an unrelated event could have influenced the jury's verdict, and we find no prejudical error.

[4] Defendant attacks the statute under which he was charged as unconstitutionally vague, and therefore void. We have previously found that G.S. 14–202.1 is not void for vagueness, *State v. Vehaun*, 34 N.C. App. 700, 239 S.E.2d 705 (1977), *cert. denied* 294 N.C. 445, 241 S.E.2d 846 (1978), and that decision is the correct one. Defendant argues that our opinion in *Vehaun* did not address the standard set out in *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), and *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974), that to avoid being unconstitutionally vague a statute must provide standards to guide those who enforce the law. We do not find, however, that G.S. 14–202.1(a)(1) is unconstitutional on this basis, and we note that this statute is much more specific than the ordinance which was held unconstitutional in *Goguen*. Defendant's argument as to unconstitutionality is without merit.

[5, 6] We find no merit in defendant's fourth argument, which is addressed to the trial court's restriction of his questioning of potential jurors. Regulation of the inquiry on voir dire rests in the court's discretion, and in order to show reversible error in the exercise of that discretion defendant must show both prejudice and a clear abuse of discretion. *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975), *death penalty vacated*, 428 U.S. 903, 96 S.Ct. 3207, 49 L.Ed.2d 1208 (1976). Neither of these appears in this case.

[7, 8] Finally, defendant argues that the trial court erred in failing to charge the jury that they must find as an essential element of the crime that defendant *willfully* took indecent liberties with the child. Defendant is correct that G.S. 14–202.-1(a)(1) requires that the taking of indecent liberties be willful, and the court should have charged on willfulness as an element. (North Carolina Pattern Jury Instruction—Criminal 226.85, upon which the court appears to have relied, inadvertently omits this element.) However, in this case all the evidence shows that if defendant took indecent liberties with the child he did so willfully, that is, purposely and without justification or excuse. *See State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473 (1965). In fact, we cannot imagine a situation in which the taking of indecent liberties for the purpose of arousing or gratifying sexual desire could be other than willful, and we fail to see what the element of willfulness adds to this statutory crime. This is a very different situation from that of abandonment and nonsupport addressed in *State v. Yelverton*, 196 N.C. 64, 144 S.E. 534 (1928), upon which defendant relies. We hold that in this case the jury by finding that defendant committed the crime necessarily found that he acted willfully, and accordingly the omission in the charge was harmless beyond a reasonable doubt.

No error.

ERWIN and HILL, JJ., concur.

Quentin GREGORY, Jr.

v.

PERDUE, INCORPORATED.

No. 796SC998.

Court of Appeals of North Carolina.

July 15, 1980.

Action was brought to recover damages for breach of contract to grow chickens.

The Superior Court, Halifax County, J. Herbert Small, J., granted defendant's motion for summary judgment and plaintiff appealed. The Court of Appeals, Wells, J., held that there was no contract to grow chickens, where plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, the time or times they would be delivered by defendant to plaintiff for growing or delivered by plaintiff to defendant after growing, or the compensation to be paid by defendant to plaintiff.

Affirmed.

1. Judgment ⇐185(2, 6)

Burden on party moving for summary judgment is to establish that there is no genuine issue as to any material fact remaining to be determined and such burden may be carried by proving that an essential element of opposing party's claim is nonexistent or by showing through discovery that opposing party cannot produce enough evidence to support an essential element of his claim. Rules of Civil Procedure, Rule 56(c), G.S. § 1A–1.

2. Judgment ⇐178

Purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Rules of Civil Procedure, Rule 56(c), G.S. § 1A–1.

3. Contracts ⇐25

Acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation.

4. Contracts ⇐25

An offer to enter into a contract in the future must, to be binding, specify all the essential and material terms and leave nothing to be agreed upon as a result of future negotiations.

5. Contracts ⇐15

To constitute a valid contract, the parties must assert the same thing in the same sense, and their minds must meet as to all terms; if any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.

6. Contracts ⇐9(1, 3)

There was no contract to grow chickens, where plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, time or times they would be delivered by defendant to plaintiff for growing or delivered by plaintiff to defendant after growing, or compensation to be paid by defendant to plaintiff.

This action was brought to recover damages for breach of contract. In his verified complaint, plaintiff alleged that in December 1976, he began dismantling and remodeling six of his chicken houses at the instruction of defendant and in reliance on defendant's promise that plaintiff would receive a contract to grow chickens for defendant in the houses. In reliance on defendant's promises, plaintiff made physical changes in the houses and applied for a $50,000 loan to remodel them. In June 1977, defendant promised plaintiff a contract for the six houses in return for which plaintiff promised that all six houses would be operational by 1 January 1978. As a condition precedent to the contract, defendant insisted that plaintiff hire a man capable of supervising the six houses, which plaintiff did at considerable expense. Defendant guaranteed plaintiff $10,000 per house per year net income on the contract. Defendant instructed plaintiff to borrow $85,000 in additional funds, and defendant agreed to escrow profits to repay this loan. In October 1977, defendant cancelled all contractual relationships with plaintiff, causing plaintiff to sustain damages in the sum of $125,000.

Defendant filed an unverified answer in which it denied the essential allegations of

the complaint and asserted as a further defense that the only agreement between defendant and plaintiff was for plaintiff to grow chickens for defendant in one house on a flock to flock basis. Defendant alleged that plaintiff's poor management and growing practices caused it to withdraw from this arrangement.

The cause came on for hearing before Judge Small on defendant's motion for summary judgment. In support of its motion, defendant offered the affidavit of its employee, Gerald Jackson, and the deposition of plaintiff. Following the hearing, the trial judge entered summary judgment for defendant, from which plaintiff appeals.

Allsbrook, Benton, Knott, Cranford & Whitaker by William O. White, Jr., Roanoke Rapids, for plaintiff-appellant.

Pritchett, Cooke & Burch by Stephen R. Burch and Jonas M. Yates, Windsor, for defendant-appellee.

WELLS, Judge.

[1, 2] On motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. G.S. 1A–1, Rule 56(c); *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972). The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972). This burden may be carried by a movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce enough evidence to support an essential element of his claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974). The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Moore v. Fieldcrest Mills, Inc., supra; Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

[3–6] We now determine the propriety of summary judgment for defendant in this case by applying these principles to the record before us. The forecast of plaintiff's evidence must be gleaned from his verified complaint and his deposition, as he submitted no other papers in opposition to defendant's motion. Considered in the light most favorable to him, plaintiff, in both his verified complaint and deposition, at most alleges an agreement by him to grow an unspecified quantity of chickens for defendant in the future under certain quality conditions in return for which defendant agreed to guarantee plaintiff a stated minimum profit and to aid him in remodeling his chicken houses. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. *Construction Co. v. Housing Authority*, 1 N.C.App. 181, 160 S.E.2d 542 (1968). An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations. *Smith v. House of Kenton Corp.*, 23 N.C.App. 439, 209 S.E.2d 397 (1974), *cert. denied*, 286 N.C. 337, 211 S.E.2d 213 (1974). To constitute a valid contract, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974).

From plaintiff's deposition, it is manifestly clear that plaintiff and defendant never reached a mutual understanding as to how many chickens plaintiff would grow, the time or times they would be delivered by defendant to plaintiff for growing or deliv-

ered by plaintiff to defendant after growing, or the compensation to be paid by defendant to plaintiff. There simply was no meeting of the minds. Under these circumstances, summary judgment was properly entered and the judgment of the trial court must be

Affirmed.

MORRIS, C. J., and PARKER, J., concur.

Carlton L. HASKINS, Jr., by Guardian ad litem, Carlton L. HASKINS, Sr.

v.

CAROLINA POWER AND LIGHT COMPANY.

No. 7911SC397.

Court of Appeals of North Carolina.

July 15, 1980.

Minor plaintiff, by his guardian at litem, brought action for personal injuries sustained as a result of an accident which occurred when minor drove his motorbike into steel cable which was stretched across roadway owned by defendant utility. The Superior Court, Harnett County, Donald L. Smith, J., granted defendant's motion for summary judgment, and plaintiff appealed. The Court of Appeals, Webb, J., held that where minor plaintiff, a 15-year-old boy, drove his motorbike, which did not have a headlight, after dark on utility's private roadway, minor plaintiff was contributorily negligent and could not recover for his personal injuries sustained in the accident.

Affirmed.

Automobiles ⇐223(7)

Where minor plaintiff, a 15-year-old boy, rode his motorbike without headlight after dark on utility's private roadway, minor plaintiff was contributorily negligent and was precluded from recovering against utility for personal injuries sustained when he drove his motorbike into steel cable which utility had placed across roadway.

The minor plaintiff, by his guardian ad litem, instituted this action for personal injuries as the result of an accident which occurred on a roadway owned by the defendant. The minor plaintiff drove his motorbike into a steel cable which was stretched across the roadway. Defendant made a motion for summary judgment, contending that plaintiff was contributorily negligent as a matter of law. The papers filed in support and in opposition to the motion for summary judgment established the following facts. On 22 April 1977 between 9:00 and 9:30 p. m., plaintiff, a 15-year-old boy, drove his motorbike onto the defendant's private roadway. The roadway was unpaved and led to the defendant's substation near Erwin. The motorbike did not have a headlight. Plaintiff was very familiar with the roadway, having operated his motorbike on it "hundreds of times" over a period of several years. Plaintiff had not been on the roadway for approximately two weeks. Approximately three days prior to 22 April 1977, defendant had installed a steel cable across the roadway. The operator of the substation testified by affidavit that the cable was put up each night to prevent vandalism and was in place approximately three feet above the roadway when he left the premises at approximately 5:00 p. m. on 22 April 1977. He also stated in his affidavit that "[a]ttached to the cable was a metal red and white sign with the word 'Danger' on it, a red flag such as used to mark the end of power poles when they are transported by trailer, and a piece of orange surveyor's ribbon or tape." Plaintiff drove his motorbike into this cable and was injured. Plaintiff stated that when he looked at the cable after the accident, he saw only a small "danger" sign on the cable.

121 Cal.App.2d 71

BURGESS v. RODOM et al.

Civ. 19412.

District Court of Appeal, Second District, Division 2, California.

Nov. 4, 1953.

Action was brought to recover damages for breach of written contract to purchase realty. The Superior Court of Santa Barbara County, Atwell Westwick, J., entered judgment adverse to vendor, and vendor appealed. The District Court of Appeal, Fox, J., held that contract was unenforceable because incomplete with respect to terms on which balance of purchase price was to be paid.

Judgment affirmed.

1. Vendor and Purchaser ⇐21

Action for damages for breach of contract for purchase or sale of realty will not lie unless writing contains essential terms and material elements of agreement without recourse to parol evidence of intention of contracting parties.

2. Vendor and Purchaser ⇐1

The law does not provide a remedy for breach of an agreement to agree in future for sale of realty, and court may not speculate on what parties will agree.

3. Vendor and Purchaser ⇐21

It is indispensable to a valid memorandum of an agreement to sell and convey realty, that memorandum be complete evidence of terms to which parties have assented.

4. Vendor and Purchaser ⇐21

If memorandum of agreement to sell realty establishes that there was in fact no contract, or if it discloses that on essential and material terms, minds of parties did not meet and that such terms were left open for future settlement, then there is no binding obligation on either vendor or purchaser.

5. Vendor and Purchaser ⇐21

Written agreement of vendor and purchaser acknowledging receipt of $200 by vendor as a deposit on purchaser's price and providing that $5,000 balance should be paid within 30 days and that terms of payment should be made as soon as new purchaser arranged for new mortgage presently held by bank was not binding on either vendor or purchaser because incomplete as to terms on which balance of purchase price was to be paid.

6. Vendor and Purchaser ⇐46

All provisions of deposit receipt relating to payment of purchase price of realty and terms should be read together.

7. Vendor and Purchaser ⇐49

In case of inconsistency between printed provisions of deposit receipt given in connection with sale of realty, and handwritten portion of receipt, handwritten portion would take preference over printed part. Code Civ.Proc. § 1862; Civ.Code, § 1651.

8. Evidence ⇐442(6)

In action to recover damages for breach of written contract to purchase realty, testimony was not admissible to establish terms, which were incomplete in written contract, and on which balance of purchase price was to be paid.

Elizabeth H. McCarthy, Los Angeles, for appellant.

Arden T. Jensen, Salvany, for respondent.

FOX, Justice.

Plaintiff seeks to recover damages for breach of contract to purchase real property. The demurrer of the defendant-vendee, Jane E. Rodom, to plaintiff's second amended complaint was sustained. Plaintiff declined to amend further. Judgment was accordingly entered that plaintiff take nothing. It is from this judgment that plaintiff appeals.

The agreement upon which the seller predicates his right of action acknowledges receipt of $200 as a deposit on the purchase price of the property and provides that "The balance of the purchase price [$5,000.] is to be paid within *30* days from date hereof, as follows, to-wit: *Terms to be made as soon as new purchaser arranges*

for new mortgage now held by Santa Ynez Valley Bank to Burgess (the seller)." The italicized portion of the agreement was inserted by handwriting in the blanks in a "deposit receipt" (California Real Estate Association Standard Form), which was signed by the plaintiff and defendant Jane E. Rodom but not signed by her husband, George.

Respondent contends that the agreement is lacking in essential elements and is fatally uncertain. Hence no cause of action is stated. Her position is well founded.

[1–4] An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parol evidence of the intention of the contracting parties. Salomon v. Cooper, 98 Cal.App.2d 521, 522–523, 220 P.2d 774; Dillingham v. Dahlgren, 52 Cal. App. 322, 326–327, 198 P. 832. The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree. Autry v. Republic Productions, Inc., 30 Cal.2d 144, 151, 152, 180 P.2d 888; Vangel v. Vangel, 116 Cal.App. 2d 615, 631, 254 P.2d 919. Hence, as pointed out in Salomon v. Cooper, supra, 98 Cal. App.2d page 523, 220 P.2d page 775: "It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. [Citations.]"

[5] Applying these principles, it is clear that the deposit receipt is incomplete in one essential feature, viz., the terms upon which the balance of the purchase price is to be paid. The deposit of $200 represents only approximately four percent of the purchase price. It appears to have been contemplated that the remaining 96 percent would be partially financed through a new mortgage at the bank and some other arrangements made for paying or securing the balance. Hence, the handwritten insertion of the provision: "Terms to be made as soon as new purchaser arranges for new mortgage now held" by the bank. How this balance would be paid, whether in monthly, quarterly, semi-annual or annual installments, or at the end of a specified term of years does not appear. Likewise, absent is the rate of interest. The security, if any, to be provided for this balance, whatever it might be, is not specified. These are all important items, yet agreement with respect to each of them was "left open for future settlement." It is therefore established from the language which the parties painstakingly wrote into the blank space in the deposit receipt that their minds had not met upon these essential and material terms of the deal. They had simply agreed to agree upon terms in the future. In such circumstances there was no binding obligation upon the buyer to accept and pay for the land. Salomon v. Cooper, supra; Dillingham v. Dahlgren, supra; Wineburgh v. Gay, 27 Cal.App. 603, 605, 150 P. 1003.

The decision in Kline v. Rogerson, 80 Cal.App.2d 158, 181 P.2d 385, is particularly pertinent here. It is stated in 80 Cal. App.2d on page 160, 181 P.2d on page 387 that "The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid 'at $5,000 or more per year, plus interest at 5% or terms *to mutual satisfaction*'. Since the parties never agreed upon terms which were mutually satisfactory, there was never an agreement of purchase and sale."

[6, 7] Plaintiff suggests that the contract calls for payment in cash in 30 days. He would treat as surplusage the handwritten addition. This, of course, he is not at liberty to do. Not only must all the provisions of the deposit receipt relating to payment and terms be read together, but in case of inconsistency the handwritten portion takes precedence over the printed

part. Code Civ.Proc. § 1862; Civ.Code, § 1651; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561, 147 P.2d 84.

[8] Plaintiff offers to supply the absent elements of an enforceable agreement by proving that respondent arranged for a loan at the bank for $2,200; that she had more than $2,800 in her account (but not in the escrow) at the bank; and that she moved into the property, remaining for about three weeks and moving out because of alleged misrepresentations relative to its construction. Such proof would be *aliunde* the writing and is not admissible for the purpose of establishing an essential and material feature of the abortive agreement. Salomon v. Cooper, supra; Dillingham v. Dahlgren, supra; Wineburgh v. Gay, supra.

In view of our conclusion that no cause of action is stated it becomes unnecessary to consider other questions raised by counsel.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

120 Cal.App.2d 811

In re THATCHER'S ESTATE.

THATCHER v. KUCHEL, Controller.

Civ. 19616.

District Court of Appeal, Second District, Division 2, California.

Oct. 26, 1953.

Petition to recover proceeds of escheated property. The Superior Court, Los Angeles County, Stanley N. Barnes, J., entered judgment of dismissal, predicated upon ground that action had not been brought to trial within five years after date of filing thereof, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where attorney for state, after expiration of five-year period entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period.

Order of dismissal reversed.

1. Dismissal and Nonsuit ⇐60(6)

Trial court is not deprived of jurisdiction of action by mere lapse of five-year period from time of filing, where parties enter into stipulation permitting trial of action prior to actual order of dismissal. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇐60(6)

Where attorney for state, after expiration of five-year period from date of filing action to recover proceeds of escheated property, entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period. Code Civ.Proc. § 583.

3. Attorney General ⇐6

In action to recover proceeds of escheated property, Attorney General had authority to waive dismissal provision of statute requiring actions to be brought to trial within five years from date plaintiff filed action. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇐60(1)

Provisions of statute requiring action to be brought to trial within five years after plaintiff has filed action are merely procedural. Code Civ.Proc. § 583.

5. States ⇐190

When state enters court as litigant, it is bound by general rule of practice and procedure established for proper functioning of courts in discharge of their duties, same as any other litigant.

6. Dismissal and Nonsuit ⇐60(1)

Statute providing for dismissal of actions for failure to bring action to trial within five years of date plaintiff filed action is applicable to action where state is party. Code Civ.Proc. § 583.

7. States ⇐119

Where state through Assistant Attorney General entered into stipulation permitting trial of action to recover proceeds of escheated property after expiration of

MACHESKY v. CITY OF MILWAUKEE.

Supreme Court of Wisconsin.
March 6, 1934.

1. Contracts ⇐9(1).
Terms of offer must be so definite, or require such definite terms in acceptance, that promises and performances are reasonably certain.

2. Vendor and purchaser ⇐18(1).
Vendor could not recover for breach of contract giving vendor first option to repurchase: there being no meeting of minds as to price.

Appeal from a judgment of the Circuit Court for Milwaukee County; Gustav G. Gehrz, Circuit Judge.

Action by Anton Machesky against the City of Milwaukee. From a judgment on a directed verdict for defendant, plaintiff appeals.—[By Editorial Staff.]

Affirmed.

Action for damages for breach of contract. Defendant denied liability. At the conclusion of a trial upon the merits, the court directed a verdict for the defendant, and judgment was entered dismissing the action. Plaintiff appealed.

Theodore Kramer, of Milwaukee (Jacob S. Rothstein, of Milwaukee, of counsel), for appellant.

Max Raskin, City Atty., and H. A. Kovenock, Asst. City Atty., both of Milwaukee, for respondent.

FRITZ, Justice.

[1, 2] Plaintiff sued to recover damages for breach of contract. Plaintiff, in writing, offered to sell to the defendant certain land with the buildings thereon. In that offer there was the following provision: "I hereby reserve the right of first option to repurchase the said buildings herein offered at such time as the City of Milwaukee shall dispose of same." Defendants duly accepted that offer. The land and buildings were duly conveyed to defendant, and plaintiff was paid therefor in accordance with the terms of the offer. However, after plaintiff had delivered possession of the premises to defendant, he failed to inform defendant that he elected to exercise the option to repurchase until after the defendant, without notice to plaintiff, had sold the buildings to another person. Defendant contends that the agreement for option falls short of being an enforceable contract because it lacks the requisite definiteness and certainty, in that it leaves the amount of the price to be fixed by later agreement between the parties. In respect to that contention it must be noted that we are here concerned with an unperformed executory agreement, and not with a claim for reasonable compensation for property delivered or services performed. It is elementary that "an offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." Restatement of the Law, Contracts, § 32.

As is stated in a footnote in 32 L. R. A. (N. S.) 430: "While the authorities are not in harmony on the question, by the weight of authority an order or contract for the purchase of personal property is lacking in an essential element, and is invalid, if the price to be paid is not expressly or impliedly incorporated therein, or some reasonably definite method for determining it agreed upon. Indeed, in most of the cases, considering the matter, the doctrine is stated that the price must be expressly stated, or some method expressly agreed upon by which it may be determined, in order to constitute a valid executory contract of sale." Harper v. Dougherty, 2 Cranch, C. C. 284, Fed. Cas. No. 6,087; Lewis v. Lofley, 60 Ga. 559; James v. Muir, 33 Mich. 224; Lambert v. Hays, 136 App. Div. 574, 121 N. Y. S. 80; Still v. Cannon, 13 Okl. 491, 75 P. 284; Wittkowsky v. Wasson, 71 N. C. 451; Scott v. Wells, 6 Watts & S. 357, 40 Am. Dec. 568; Bigley v. Risher, 63 Pa. 152, 13 Morr. Min. Rep. 176; Asebal v. Levy, 10 Bing. 376, 4 Moore & S. 217, 3 L. J. C. P. N. S. 98.

Appellant's supplemental brief relies upon the decision in Bowser & Co. v. Marks, 96 Ark. 113, 131 S. W. 334, 32 L. R. A. (N. S.) 429, Ann. Cas. 1912B, 357. However, as is stated in the opinion in that case, the property, for which the vendor was seeking to recover the reasonable value, had been delivered by the vendor to a common carrier, pursuant to the vendees' order, so that the title thereto had passed to the latter. Consequently, in that case, as well as in the other cases cited in that opinion, and all of the others relied upon by appellant, the contract had been executed by the delivery of the property, or the performance of the services contracted for.

In Fogg v. Price, 145 Mass. 513, 14 N. E. 741, 743, the court passed upon a covenant

which read as follows: "If the premises are for sale at any time, the lessee shall have the refusal of them." That, in substance, was virtually to the same effect as the provision in the case at bar. The court, in holding that covenant void for uncertainty, said: "This is simply an agreement to give the lessee the first chance to make a contract,—an agreement to sell,—if the parties can agree, but not otherwise. It neither fixes the price, nor provides any way in which it can be fixed. Suppose that the premises had been advertised for sale, and that the tenant had brought his bill at once. It is plain that the court could not have named any sum at which the lessor should be compelled to sell. Considered, therefore, in the light of a contract to sell, as it is treated by the bill, it does not satisfy the statute of frauds, and apart from the statute it is not such a contract as equity can specifically enforce."

That is equally applicable to the provision upon which plaintiff relies. It neither provides that the price was to be some specified or a reasonable amount, nor does it provide any manner by which the price is to be ascertained or determined. At best it is nothing more than an agreement to make a future agreement as to an essential term, which cannot be supplied by implication of law. Under the circumstances, because there has been no meeting of the minds as to an essential term, there can be no recovery. Laird v. Boyle, 2 Wis. 431; Freeman v. Morris, 131 Wis. 216, 109 N. W. 983, 20 Am. St. Rep. 1038, 11 Ann. Cas. 481; Goldstine v. Tolman, 157 Wis. 141, 147 N. W. 7; St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N. Y. 30, 138 N. E. 495; Ansorge v. Kane, 244 N. Y. 395, 155 N. E. 683; Pfent v. Michaux, 231 Mich. 500, 204 N. W. 86.

Judgment affirmed.

OWEN, J., took no part.

DETTLOFF v. LANGKAU.

Supreme Court of Wisconsin.
March 6, 1934.

Partnership ⇨34.

Where painter represented expressly and by acquiescence that another was his partner, alleged partner had apparent authority to receive payment for work done and release employer, notwithstanding partnership representations were untrue.

Appeal from a judgment of the Municipal Court for Winnebago County; Silas Spengler, Municipal Judge.

Action by Mike Dettloff against Otto Langkau. Judgment for plaintiff, and defendant appeals.—[By Editorial Staff.]

Reversed and remanded.

This action was begun on September 2, 1932, to recover for services rendered under contract. Upon the trial, the court found in favor of the plaintiff, judgment being entered on January 3, 1933, from which the defendant appeals.

From the evidence it appears that the plaintiff is a painting contractor. He and another contractor by the name of Alfred Pasano entered into an arrangement which Pasano claims was a partnership and which the plaintiff claims was an employment of Pasano by the plaintiff. Pasano had worked for the plaintiff by the hour. Upon the evidence, the trial court concluded that there was no partnership, but did not find the facts upon which the conclusion rests.

Upon the trial the plaintiff testified that he was a sole trader; that he made an arrangement with Pasano by which Pasano was to look up jobs; that the Langkau job was reported to plaintiff; and that the plaintiff made the contract under which the painting was done. He said: "Mr. Pasano was along with me and told me where the people lived. He looked the job up for me. He wasn't a partner of mine. I never heard him tell anyone that he was a partner of mine, and I never told anyone he was a partner of mine. He got a premium of ten cents an hour more if he would get the job. That was the scale. He didn't take the job, I did it. He just canvassed the job for me."

The defendant testified that Pasano introduced Dettloff to him as Pasano's partner, to which Dettloff made no response; Dettloff and Pasano came together; the estimate was submitted on a slip which had the name of Dettloff at the top. Defendant further testified that his talk was with Pasano as to the price. The defendant's wife testified that when Pasano brought Dettloff in, Pasano said, "This is my partner, Mr. Dettloff"; that Mr. Dettloff made no response. The defendant's daughter testified to the introduction, at which time she stated that Pasano said:

(225 N. Y. 323)

SUN PRINTING & PUBLISHING ASS'N v. REMINGTON PAPER & POWER CO., Inc.

(Court of Appeals of New York. April 17, 1923.)

1. Sales ⟸1(3)—Where price and length of terms during which price was to apply were to be agreed on, agreement on price without agreement on length of terms held insufficient to bind seller.

Where a contract provided for the purchase of paper during September, 1919, to December, 1920, inclusive, at a definite price for the shipments during the last four months of 1919, and for 1920 "the price of the paper and length of terms for which such price shall apply shall be agreed upon * * * 15 days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon," the price in no event to be higher than the contract price charged by a named company "to the large consumers," *held* that, as to the 1920 shipments, an agreement as to price, as by impliedly agreeing on the maximum price charged by the named company, by failure to agree on a less price, was insufficient without an agreement as to the length of term for which the price should be applied, the result being an agreement to agree, so that the seller was legally justified in refusing deliveries for 1920.

2. Contracts ⟸143—Court may not revise contract while professing to construe it.

A court is not at liberty to revise a contract while professing to construe it.

Crane and Hogan, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Sun Printing & Publishing Association against the Remington Paper & Power Company, Inc. From an order of the Appellate Division (201 App. Div. 3, 193 N. Y. Supp. 698), which reversed an order of the Special Term denying plaintiff's motion for judgment on the pleadings, and granted said motion, defendant, by permission, appeals. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Order of Appellate Division reversed, and that of Special Term affirmed, with costs in the Appellate Division, and question answered.

Nathan L. Miller, of New York City, for appellant.

Archibald R. Watson, John M. Harrington, and Ralph O. Willguss, all of New York City, for respondent.

CARDOZO, J. [1] Plaintiff agreed to buy and defendant to sell 1,000 tons of paper per month during the months of September, 1919, to December, 1920, inclusive, 16,000 tons in all. Sizes and quality were adequately described. Payment was to be made on the 20th of each month for all paper shipped the previous month. The price for shipments in September, 1919, was to be $3.73¾ per 100 pounds, and for shipments in October, November, and December, 1919, $4 per 100 pounds. "For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates."

Between September, 1919, and December of that year, inclusive, shipments were made and paid for as required by the contract. The time then arrived when there was to be an agreement upon a new price and upon the term of its duration. The defendant in advance of that time gave notice that the contract was imperfect, and disclaimed for the future an obligation to deliver. Upon this the plaintiff took the ground that the price was to be ascertained by resort to an established standard. It made demand that during each month of 1920 the defendant deliver 1,000 tons of paper at the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the defendant to receive the benefit of any differentials in freight rates. The demand was renewed month by month till the expiration of the year. This action has been brought to recover the ensuing damage.

Seller and buyer left two subjects to be settled in the middle of December and at unstated intervals thereafter. One was the price to be paid. The other was the length of time during which such price was to govern. Agreement as to the one was insufficient without agreement as to the other. If price and nothing more had been left open for adjustment, there might be force in the contention that the buyer would be viewed, in the light of later provisions, as the holder of an option. Cohen & Sons v. Lurie Woolen Co., 232 N. Y. 112, 133 N. E. 370. This would mean that, in default of an agreement for a lower price, the plaintiff would have the privilege of calling for delivery in accordance with a price established as a maximum. The price to be agreed upon might be less, but could not be more, than "the contract price for news print charged by the Canadian Ex-

port Paper Company to the large consumers." The difficulty is, however, that ascertainment of this price does not dispense with the necessity for agreement in respect of the term during which the price is to apply. Agreement upon a maximum payable this month or to-day is not the same as an agreement that it shall continue to be payable next month or to-morrow. Seller and buyer understood that the price to be fixed in December for a term to be agreed upon would not be more than the price then charged by the Canadian Export Paper Company to the large consumers. They did not understand that, if during the term so established the price charged by the Canadian Export Paper Company was changed, the price payable to the seller would fluctuate accordingly. This was conceded by plaintiff's counsel on the argument before us. The seller was to receive no more during the running of the prescribed term, though the Canadian Maximum was raised. The buyer was to pay no less *during that term*, though the maximum was lowered. In the brief, the standard was to be applied at the beginning of the successive terms, but once applied was *to be maintained until* the term should have expired. While the term was unknown, the contract was inchoate.

The argument is made that there was no need of an agreement as to time unless the price to be paid was lower than the maximum. We find no evidence of this intention in the language of the contract. The result would then be that the defendant would never know where it stood. The plaintiff was under no duty to accept the Canadian standard. It does not assert that it was. What it asserts is that the contract amounted to the concession of an option. Without an agreement as to time, however, there would be not one option, but a dozen. The Canadian price to-day might be less than the Canadian price to-morrow. Election by the buyer to proceed with performance at the price prevailing in one month would not bind it to proceed at the price prevailing in another. Successive options *to be exercised* every month would thus be read into the contract. Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer. Even if, however, we were to interpolate the restriction that the option, if exercised at all, must be exercised only once, and for the entire quantity permitted, the difficulty would not be ended. Market prices in 1920 happened to rise. The importance of the time element becomes apparent when we ask ourselves what the seller's position would be if they had happened to fall. Without an agreement as to time, the maximum would be lowered from one shipment to another with every reduction of the standard. With such an agreement, on the other hand, there would be stability and certainty. The parties attempted to guard against the contingency of failing to come together as to price. They did not guard against the contingency of failing to come together as to time. Very likely they thought the latter contingency so remote that it could safely be disregarded. In any event, whether through design or through inadvertence, they left the gap unfilled. The result was nothing more than "'an agreement to agree." St. Regis Paper Co. v. Hubbs & Hastings Paper Co., 235 N. Y. 30, 36, 138 N. E. 495. Defendant "exercised its legal right" when it insisted that there was need of something more. St. Regis Paper Co. v. Hubbs & Hastings Paper Co., supra; 1 Williston Contracts, § 45. The right is not affected by our appraisal of the motive. Mayer v. McCreery, 119 N. Y. 434, 440, 23 N. E. 1045.

[2] We are told that the defendant was under a duty, in default of an agreement, to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business. To hold it to such a standard is to make the contract over. The defendant reserved the privilege of doing its business in its own way, and did not undertake to conform to the practice and beliefs of others. United Press v. New York Press Co., 164 N. Y. 406, 413, 58 N. E. 527, 53 L. R. A. 288. We are told again that there was a duty, in default of other agreement, to act as if the successive terms were to expire every month. The contract says they are to expire at such intervals as the agreement may prescribe. There is need, it is true, of no high degree of ingenuity to show how the parties, with little change of language, could have framed a form of contract to which obligation would attach. The difficulty is that they framed another. We are not at liberty to revise while professing to construe.

We do not ignore the allegation of the complaint that the contract price charged by the Canadian Export Paper Company to the large consumers "constituted a definite and well-defined standard of price that was readily ascertainable." The suggestion is made by members of the court that the price so charged may have been known to be one established for the year, so that fluctuation would be impossible. If that was its character, the complaint should so allege. The writing signed by the parties calls for an agreement as to time. The complaint concedes that no such agreement has been made. The result, prima facie, is the failure of the contract. In that situation the pleader has the burden of setting forth the extrinsic circumstances, if there are any, that make

agreement unimportant. There is significance, moreover, in the attitude of counsel. No point is made in brief or in argument that the Canadian price, when once established, is constant through the year. On the contrary, there is at least a tacit assumption that it varies with the market. The buyer acted on the same assumption when it renewed the demand from month to month, making tender of performance at the prices then prevailing. If we misconceive the course of dealing, the plaintiff by amendment of its pleading can correct our misconception. The complaint as it comes before us leaves no escape from the conclusion that agreement in respect of time is as essential to a completed contract as agreement in respect of price. The agreement was not reached, and the defendant is not bound.

The question is not here whether the defendant would have failed in the fulfillment of its duty by an arbitrary refusal to reach any agreement as to time after notice from the plaintiff that it might make division of the terms in any way it pleased. No such notice was given, so far as the complaint discloses. The action is not based upon a refusal to treat with the defendant and attempt to arrive at an agreement. Whether any such theory of liability would be tenable we need not now inquire. Even if the plaintiff might have stood upon the defendant's denial of obligation as amounting to such a refusal, it did not elect to do so. Instead, it gave its own construction to the contract, fixed for itself the length of the successive terms, and thereby coupled its demand with a condition which there was no duty to accept. Rubber Trading Co. v. Manhattan Rubber Mfg. Co., 221 N. Y. 120, 116 N. E. 789; 3 Williston, Contracts, § 1334. We find no allegation of readiness, and offer to proceed on any other basis. The condition being untenable, the failure to comply with it cannot give a cause of action.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in the Appellate Division and in this court, and the question certified answered in the negative.

CRANE, J. (dissenting). I cannot take the view of this contract that has been adopted by the majority. The parties to this transaction beyond question thought they were making a contract for the purchase and sale of 16,000 tons rolls news print. The contract was upon a form used by the defendant in its business, and we must suppose that it was intended to be what it states to be, and not a trick or device to defraud merchants. It begins by saying that, in consideration of the mutual covenants and agreements herein set forth the Remington Paper & Power Company, Incorporated, of Watertown, state of New York, hereinafter called the seller, agrees to sell and hereby does sell and the Sun Printing & Publishing Association of New York City, state of New York, hereinafter called the purchaser, agrees to buy and pay for and hereby does buy the following paper, 16,000 tons rolls news print. The sizes are then given. Shipment is to be at the rate of 1,000 tons per month to December, 1920, inclusive. There are details under the headings consignee, specifications, price and delivery, terms, miscellaneous, cores, claims, contingencies, cancellations.

Under the head of miscellaneous comes the following:

"The price agreed upon between the parties hereto, for all papers shipped during the month of September, 1919, shall be $3.73¾ per hundred pounds gross weight of rolls on board cars at mills.

"The price agreed upon between the parties hereto for all shipments made during the months of October, November and December, 1919, shall be $4.00 per hundred pounds gross weight of rolls on board cars at mills.

"For the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof has been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Company to the large consumers, the seller to receive the benefit of any differentials in freight rates.

"It is understood and agreed by the parties hereto that the tonnage specified herein is for use in the printing and publication of the various editions of the Daily and Sunday New York Sun, and any variation from this will be considered a breach of contract."

After the deliveries for September, October, November, and December, 1919, the defendant refused to fix any price for the deliveries during the subsequent months, and refused to deliver any more paper. It has taken the position that this document was no contract; that it meant nothing; that it was formally executed for the purpose of permitting the defendant to furnish paper or not, as it pleased.

Surely these parties must have had in mind that some binding agreement was made for the sale and delivery of 16,000 tons rolls of paper, and that the instrument contained all the elements necessary to make a binding contract. It is a strain upon reason to imagine the paper house, the Remington Paper & Power Company, Incorporated, and the Sun Printing & Publishing Association, form-

ally executing a contract drawn up upon the defendant's prepared form which was useless and amounted to nothing. We must, at least, start the examination of this agreement by believing that these intelligent parties intended to make a binding contract. If this be so, the court should spell out a binding contract, if it be possible. I not only think it possible, but think the paper itself clearly states a contract recognized under all the rules at law. It is said that the one essential element of price is lacking; that the provision above quoted is an agreement to agree to a price, and that the defendant had the privilege of agreeing or not, as it pleased; that, if it failed to agree to a price, there was no standard by which to measure the amount the plaintiff would have to pay. The contract does state, however, just this very thing. Fifteen days before the 1st of January, 1920, the parties were to agree upon the price of the paper to be delivered thereafter, and the length of the period for which such price should apply. However, the price to be fixed was not "to be higher than the contract price for news print charged by the Canadian Export Paper Company to large consumers." Here, surely, was something definite. The 15th day of December arrived. The defendant refused to deliver. At that time there was a price for news print charged by the Canadian Export Paper Company. If the plaintiff offered to pay this price, which was the highest price the defendant could demand, the defendant was bound to deliver. This seems to be very clear.

But, while all agree that the price on the 15th day of December could be fixed, the further objection is made that the period during which that price should continue was not agreed upon. There are many answers to this.

We have reason to believe that the parties supposed they were making a binding contract; that they had fixed the terms by which one was required to take and the other to deliver; that the Canadian Export Paper Company price was to be the highest that could be charged in any event. These things being so, the court should be very reluctant to permit a defendant to avoid its contract. Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676.

On the 15th of the fourth month, the time when the price was to be fixed for subsequent deliveries, there was a price charged by the Canadian Export Paper Company to large consumers. As the defendant failed to agree upon a price, made no attempt to agree upon a price, and deliberately broke its contract, it could readily be held to deliver the rest of the paper, 1,000 rolls a month, at this Canadian price. There is nothing in the complaint which indicates that this is a fluctuating price, or that the price of paper as it was on December 15th was not the same for the remaining 12 months. Or we can deal with this contract month by month. The deliveries were to be made 1,000 tons per month. On December 15th 1,000 tons could have been demanded. The price charged by the Canadian Export Paper Company on the 15th of each month on and after December 15, 1919, would be the price for the 1,000-ton delivery for that month. Or, again, the word as used in the miscellaneous provision quoted is not "price," but "contract price"—"in no event to be higher than the contract price." Contract implies a term or period, and, if the evidence should show that the Canadian contract price was for a certain period of weeks or months, then this period could be applied to the contract in question. Failing any other alternative, the law should do here what it has done in so many other cases—apply the rule of reason and compel parties to contract in the light of fair dealing. It could hold this defendant to deliver its paper as it agreed to do, and take for a price the Canadian Export Paper Company contract price for a period which is reasonable under all the circumstances and conditions as applied in the paper trade.

To let this defendant escape from its formal obligations when any one of these rulings as applied to this contract would give a practical and just result is to give the sanction of law to a deliberate breach. Wood v. Lucy, Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214; Moran v. Standard Oil Co., 211 N. Y. 187, 105 N. E. 217; United States Rubber Co. v. Silverstein, 229 N. Y. 168, 128 N. E. 123.

For these reasons I am for the affirmance of the courts below.

HISCOCK, C. J., and POUND, McLAUGHLIN, and ANDREWS, JJ., concur with CARDOZO, J.

CRANE, J., reads dissenting opinion with which HOGAN, J., concurs.

Order reversed, etc.

This form is submitted in duplicate

PTO/SB/17 (12-04)
Approved for use through 07/31/2006. OMB 0651-0032
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Effective on 12/08/2004.
Fees pursuant to the Consolidated Appropriations Act, 2005 (H.R. 4818).

FEE TRANSMITTAL
For FY 2005

☐ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT	($) 500.00

Complete if Known	
Application Number	09/698,502
Filing Date	October 27, 2000
First Named Inventor	NEREIDA MARIA MENENDEZ
Examiner Name	Naresh Vig
Art Unit	3629
Attorney Docket No.	285277-00018

METHOD OF PAYMENT (check all that apply)

☐ Check ☑ Credit Card ☐ Money Order ☐ None ☐ Other (please identify): _____

☑ Deposit Account Deposit Account Number: 02-2556 Deposit Account Name: Eckert Seamans

For the above-identified deposit account, the Director is hereby authorized to: (check all that apply)

☑ Charge fee(s) indicated below (to Credit Card)
☑ Charge any additional fee(s) or underpayments of fee(s) under 37 CFR 1.16 and 1.17 and 41.20 (to the Deposit Account)
☐ Charge fee(s) indicated below, **except for the filing fee**
☑ Credit any overpayments (to the Deposit Account)

WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.

FEE CALCULATION

1. BASIC FILING, SEARCH, AND EXAMINATION FEES

	FILING FEES		SEARCH FEES		EXAMINATION FEES		
Application Type	Fee ($)	Small Entity Fee ($)	Fee ($)	Small Entity Fee ($)	Fee ($)	Small Entity Fee ($)	Fees Paid ($)
Utility	300	150	500	250	200	100	
Design	200	100	100	50	130	65	
Plant	200	100	300	150	160	80	
Reissue	300	150	500	250	600	300	
Provisional	200	100	0	0	0	0	

2. EXCESS CLAIM FEES

Fee Description	Fee ($)	Small Entity Fee ($)
Each claim over 20 or, for Reissues, each claim over 20 and more than in the original patent	50	25
Each independent claim over 3 or, for Reissues, each independent claim more than in the original patent	200	100
Multiple dependent claims	360	180

Total Claims	Extra Claims	Fee ($)	Fee Paid ($)
_____ - 20 or HP =	_____	x _____	= _____

HP = highest number of total claims paid for, if greater than 20

Indep. Claims	Extra Claims	Fee ($)	Fee Paid ($)
_____ - 3 or HP =	_____	x _____	= _____

HP = highest number of independent claims paid for, if greater than 3

Multiple Dependent Claims	
Fee ($)	Fee Paid ($)
_____	_____

3. APPLICATION SIZE FEE

If the specification and drawings exceed 100 sheets of paper, the application size fee due is $250 ($125 for small entity) for each additional 50 sheets or fraction thereof. See 35 U.S.C. 41(a)(1)(G) and 37 CFR 1.16(s).

Total Sheets	Extra Sheets	Number of each additional 50 or fraction thereof	Fee ($)	Fee Paid ($)
_____ - 100 =	_____	/ 50 = _____ (round up to a whole number) x	_____	= _____

4. OTHER FEE(S)

	Fees Paid ($)
Non-English Specification, $130 fee (no small entity discount)	
Other: Filing a Brief in Support of an Appeal-37 CFR 41.20(b)(2)	$500.00

SUBMITTED BY

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